SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 181 12

ANTHONY M. GROSSO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1966
CERTIORARI GRANTED OCTOBER 10, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 181

ANTHONY M. GROSSO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Proceedings in the U.S.C.A. for the Third Circuit		
Appendix for appellant consisting of portions of the record from the U.S.D.C. for the Western District of Pennsylvania	A	1
Docket entries	1a	1
Indictment	13a	12
Motion to dismiss indictment	28a	25
Opinion on motion to dismiss indictment and order denying, Gourley, J.	97a	26
Transcript of proceedings (excerpts)	104a	29
Testimony of W. Dean Struble—cross	160a	29
Motion for judgment of acquittal at the close of the Government's evidence	236a	36
Proceedings, March 6, 1964—Jury Deliberation and Sentence	321a	39
Verdict, March 7, 1964	347a	62
Proceedings, March 10, 1964—Arguments on motions	353a	67
Motion for judgment of acquittal after verdict	371a	75

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 2, 1966

	Original	Print
Appendix for appellant consisting of portions of the record from the U.S.D.C. for the Western District of Pennsylvania—Continued		
Motion for new trial	374a	78
Affidavit of James E. McLaughlin	381a	84
Order, March 11, 1964	385a	87
Notice of appeal	385a	88
Appellee's Appendix consisting of portions of the record from the U.S.D.C. for the Western District of Pennsylvania	387	89
Excerpts from transcript of testimony	388	89
Testimony of W. Dean Struble—direct	389	89
Colloquy	396	95
Testimony of W. Dean Struble—direct	398	96
redirect	405	101
Anthony M. Grosso—direct	407	102
Opinion, Smith, J.	420	113
Judgment	436	129
Appellant's petition for rehearing in banc (omitted in printing)	437	129
Order denying petition for rehearing in banc	438	130
Clerk's certificate (omitted in printing)	439	130
Order allowing certiorari	440	131

[fol. A]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,810

UNITED STATES OF AMERICA,

vs.

ANTHONY M. GROSSO, SAMUEL J. GROSSO, JENNIE B. GROSSO, JOSEPH PINO.

Appeal of Anthony M. Grosso

Appeal from the Judgment and Order of the United States District Court for the Western District of Pennsylvania at Criminal No. 62-281.

Appendix for Appellant—Filed September 10, 1964

[fol. 1a]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

Doc. No.	*Date*	*Docket Entries*
	1962	
	• • • • • • •	
1	Sept. 26	Indictment filed.
	• • • • • • •	
9	Nov. 15	Hearing on Oral Motion to defer plea of Anthony Grosso begun and concluded before Rosenberg, J. (Rep. E. Pock) (Motion granted and written order to be entered.)

Doc. No.	Date	Docket Entries
	1962	
9	Nov. 15	The above named defts. Samuel J. Grosso, Jennie B. Grosso and Joseph Pino, being arraigned, all plead NOT GUILTY in open court before Rosenberg, J. (Rep. E. Pock.)
10	Dec. 13	Motion to dismiss indictment filed by deft. Anthony M. Grosso.
	Dec. 14	Deft. Anthony M. Grosso arraigned in open court before Sorg, J. pleads NOT GUILTY, Rep. W. Dalton.
	• • • • • • •	
	1963	
18	Feb. 18	Motion to dismiss indictment filed by defts.
19	Feb. 18	Motion for suppression of evidence filed by defts.
	• • • • • • •	
21	Feb. 20	Order entered directing that the motion to dismiss the indictment is fixed for hearing [fol. 2a] on 3-20-63 at 10:00 A. M., and counsel for the parties are directed to file their briefs on or before 3-15-63 at 10:00 A. M. If counsel for any of the parties fail to comply with this Order, appropriate sanctions and penalties will be imposed (Gourley, J.)
22	Feb. 20	Order entered directing that the motion for suppression of evidence is fixed for hearing on 3-20-63 at 10:00 A. M., and counsel for the parties are directed to submit their briefs in support of this motion on or before 3-15-63 at 10:00 A. M. It is further ordered that counsel for the Gov't. have certain information available as stated more fully in this Order. (Gourley, J.)

Doc. No.	*Date*	*Docket Entries*
	1963	
23	Feb. 20	Memorandum Order entered directing that the motion for bill of particulars is fixed for hearing on 3-20-63 at 10:00 A. M. Counsel are directed to submit to the Court their briefs on or before 3-15-63 at 10:00 A. M. (Gourley, J.)
24	Mar. 15	Hearing on Motion to Suppress Evidence begun and concluded C. A. V. before Gourley, J. Hearing memo filed. (Rep. R. Palmer.)
25	Mar. 18	Order entered directing that arguments on deft's Motion to Dismiss Indictment, Mo- [fol. 3a] tion for Bill of Particulars Ancillary to Motion to Suppress, and hearings on defts' Motion for Suppression of Evidence previously scheduled for March 20, 1963 are continued until further Order of Court. (Gourley, J.)
26	Apr. 17	Transcript filed *re:* Hearing date on deft's motions to suppress evidence held at Pgh. 3/15/63 before Gourley, J. (Rep. R. Palmer.)
27	Apr. 25	Hearing on Motion to set a date for Hearing on Motion to Suppress begun and concluded before Gourley, J. Memo filed. (Rep. R. Palmer) (Counsel to present petition to court.)
28	May 10	Transcript filed *re:* Further hearing *re* time for hearing on deft's motions to suppress evidence held at Pgh. 4/25/63, before Gourley, J. (Rep. R. Palmer.)
29	June 25	Order ent. directing that Motion for Bill of Particulars, Motion to Dismiss indictment and Motion for Suppression of Evidence is

Doc. No.	Date	Docket Entries
	1963	
		fixed for hearing & argument on 9/23/63 at 10 A. M. and further that on that date counsel are to be prepared to offer evidence, oral or documentary in support of their respective positions and finally ordering that if counsel desire to file supplementary or reply [fol. 4a] briefs, they shall do so on or before 9/16/63. (Gourley, J.)
30	Sept. 16	Motion for leave to amend Deft's Motion to the Suppression of Evidence filed by defts.
31	Sept. 17	Order entered directing that the hearing & argument on deft's Motion for the Suppression of Evidence is fixed for 9-23-63 at 10:00 A. M., the date and time fixed for hearing and argument on deft's other motions previously filed. (Gourley, J.)
	Sept. 23	Hearing on Motion for Suppression of Evidence, Motion for Bill of Particulars & Motion to dismiss begun before Gourley, J. (Rep. J. Lilienthal.)
	Sept. 24	Hearing continues.
	Sept. 25	Hearing continues.
	Sept. 26	Hearing continues.
32	Sept. 26	Order entered directing that the hearing on the divers motions is continued to 10:00 A. M. on 9-30-63. (Gourley, J.)
33	Sept. 30	Hearing continued and concluded C. A. V. Hearing memo filed. (Rep. J. LaMotte—9-30-63.)
34	Sept. 30	Order entered directing defts. to file brief within 10 days after filing of the entire transcript and giving the government 5 days to

Doc. No.	*Date*	*Docket Entries*
	1963	
		file brief after filing of the defts' brief. (Gourley, J.)
[fol. 5a]		
35	Sept. 30	Stipulation *re* defts' Motion for Suppression of Evidence filed by counsel with Order thereon approving same. (Gourley, J.)
36	Sept. 30	Order entered denying Motion for Suppression of Evidence in regards to the items of evidence enumerated in Para. 1, 10, 15, 20, 21, 23. (Gourley, J.)
41	Oct. 1	Order entered directing that the defts. Motion for Bill of Particulars Ancillary to Motion to Suppress hereby is denied. (Gourley, J.)
38	Sept. 30	Praecipe by Thomas A. Wadden as counsel for Joseph Pino and Jennie Grosso (R. Weinberg).
39	Sept. 30	Praecipe by Vincent Fuller as counsel for Samuel Grosso.
40	Sept. 30	Praecipe by James McLaughlin for Anthony Grosso.
42	Oct. 2	Order entered directing that the defts. motion for leave to amend defts. Motion for the Suppression of Evidence is granted. (Gourley, J.)
	1964	
47	Jan. 9	Opinion filed and Order entered directing that defts. Motion for Suppression of Evi-

Doc. No.	Date	Docket Entries
	1964	
		[fol. 6a] dence described in paragraphs 3 and 25 of said Motion is hereby denied and the within proceedings is fixed for trial to commence 2-3-64, and no continuances will be granted; Opinion on Motion to Dismiss Indictment filed and Order entered directing that deft's Motion to Dismiss Indictment is hereby denied. (Gourley, J.)
49	Feb. 3	Motion for Severance by defts. Samuel J. Grosso, Jennie B. Grosso and Joseph Pino.
51	Feb. 4	Order dated 2/3/64 entered granting Motion for Severance; further Ordered that oral motion of U. S. A. for trial of deft. Anthony M. Grosso precede the trial of defts. Samuel Grosso, Jennie Grosso and Joseph Pino is granted and that trial commence on 2/3/64. (Foley, J.)
52	Feb. 3	Order ent. directing that this case Cr 62-281 be assigned to Hon. Roger T. Foley, for trial and final determination. (Gourley, J.)
	Feb. 3	Jury trial as to deft. Anthony M. Grosso begun before Foley, J.. and a jury.
	Feb. 4	Jury trial continues.
[fol. 7a]		
54	Feb.. 17	Hearing begun on deft's oral motion for Judgment of Acquittal before Foley, J.
55	Feb. 18	Motion for Judgment of Acquittal at close of Government's evidence filed by deft.
	Feb. 18	Hearing continues and concludes on deft's. Motion for Judgment of Acquittal before

Doc. No.	Date	Docket Entries
	1964	
		Foley, J. Hearing memo filed. (Reps. J. Lilienthal and J. LaMotte) (Denied as to Cts. 1, 2, 3 thru 15, 16 and 17; Ct. 18 to be dismissed against Anthony Grosso; Ct. 19 withdrawn; decision reserved by Court on Cts. 20, 21, 22 and 23.)
		* * * * * * *
56	Feb. 24	Petition filed and Order entered directing that a Writ of *Habeas Corpus Ad Testificandum* be issued for Harry Levine, Eugene Hurte and Robert Maloney. (Miller, J.)
	Feb. 24	Writ of *Habeas Corpus Ad Testificandum* issued.
	Feb. 25	Jury trial continues.
	Feb. 26	Jury trial continues.
	Feb. 27	Jury trial continues.
	Feb. 28	Jury trial continues.
	Feb. 28	Following motions made orally in Court and denied orally; Motion for Judgment of Acquittal, Motion to Renew all motions here- [fol. 8a] tofore ruled on and to dismiss Cts. 20, 21, 22 and 23. (Foley, J.)
	Mar. 2	Hearing on Deft's motion for a mistrial held and denied orally. (Foley, J.)
		* * * * * * *
58	Mar. 4	Requests for Instructions filed by deft. with refusal of 1, 2, 3, 5, 7, 9, 10, 11, 12 and 14. (Foley, J.)
59	Mar. 4	Order *re* jury accommodations, etc. filed. (Foley, J.) CC issued.
60	Mar. 5	Writ of *Hab. Corp. ad Testif.*, on Harry Levine, Eugene Hurte and Robt. Maloney returned executed on 2/24/64.

Doc. No.	*Date*		*Docket Entries*
	1964		
	Mar.	5	(Jurors deliberating.)
	Mar.	6	(Jurors deliberating.)
61	Mar.	7	Jury deliberates and returns a verdict (8:30 P. M.) find the deft. Anthony M. Grosso guilty on Cts. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, and 23, and Not Guilty as to Ct. 5. Verdict sheet filed.
	Mar.	9	Bail orally denied in Open Court. (Foley, J.)
62	Mar.	9	Instructions to the Jury filed by the Court. (Foley, J.)
63	Mar.	10	The sentence of the Court, imposed 3/9/64, is that the deft. Anthony M. Grosso be imprisoned for one year and pay fine of $1,000.00; that he be further imprisoned until [fol. 9a] payment of fine as to Ct. 1. Ct. 2: One year and pay fine of $10,000.00 together with costs; stay imprisoned until payment of fine. Imprisonment to run consecutively with sentence imposed at Ct. 1. Ct. 3: One year imprisonment and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run consecutive with sentence imposed at Ct. 2. Ct. 4: One year imprisonment and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 6: One year imprisonment and pay fine of $10,000.00 with costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 7: One year and pay fine of $10,000.00 and costs; stay im-

Doc. No. *Date* *Docket Entries*

1964

prisoned until payment of fine. Imprisonment to run consecutively with sentence imposed at Ct. 3. Ct. 8: One year and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 9: One year and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with [fol. 10a] imprisonment imposed at Ct. 2. Ct. 10: One year and pay $10,000.00 fine and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 11: One year and pay $10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 12: One year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 13: One year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 14: One year and pay fine of $10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run consecutively with sentence imposed at Ct. 7. Ct. 15: One year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 16: One year and pay $10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run concurrently with sen-

Doc. No.	Date	Docket Entries
	1964	
		tence imposed at Ct. 2. Ct. 17: One year and $10,000.00 fine and costs; stay impris- [fol. 11a] oned until paid. Imprisonment to run concurrently with sentence imposed Ct. 2. Ct. 20: One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run consecutively with sentence imposed at Ct. 14. Ct. 21: One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run consecutively with sentence imposed at Ct. 20. Ct. 22: One year, pay $10,000.00 fine and costs; stay imprisoned until paid. Imp. to run consecutively with sent. imposed at Ct. 21. Ct. 23; One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imp. to run consecutively with sentence imposed at Ct. 22. Total imprisonment is nine (9) years and the total fine is $191,000.00 (Foley, J.).
64	Mar. 10	Motion for Judgment of acquittal after verdict filed by deft. A. Grosso.
65	Mar. 10	Motion for New Trial filed by deft. A. Grosso.
66	Mar. 10	Affidavit of Fred C. Koerner, Jr. filed by deft. A. Grosso.
67	Mar. 10	Hearing on Motion for Judgment of Acquittal held before Foley, J. and concluded. Hearing memo filed. (Motion denied orally [fol.12a] in all respects.) (Rep. B. Cook.)
68	Mar. 10	Hearing on Motion for New Trial held before Foley, J. and concluded, Hearing denied

Doc. No.	Date	Docket Entries
	1964	
		orally in all respects—request by deft's counsel for written order denying bail refused—Order contained in the record.
69	Mar. 10	Notice of Appeal filed by deft. Anthony M. Grosso.
	Mar. 10	Copy of Notice mailed U. S. Court of Appeals together with copy of docket entries.
	Mar. 11	Copy of Notice mailed U. S. Attorney; letters to deft's counsel and Judges Foley and Gourley.
70	Mar. 11	Order entered directing U. S. Marshal to pay medical bill to Dr. Stoffan for services rendered to two ill jurors during deliberation. (Foley, J.) (C. C. Issued.)
71	Mar. 11	Order ent. directing that supporting affidavit referred to in Motion for New Trial on Mar. 10 be made part of the record on that motion. The submission of the affidavit does not alter the decision of the Court that the Motion for New Trial should be and is denied in all respects. (Foley, J.)
	Mar. 11	Deft. Samuel J. Grosso withdrew plea of Not Guilty ent. 11/15/62 and ent. plea of [fol. 13a] GUILTY to Ct. 1 before Foley, J. (Rep. B. Cook.)
	Mar. 11	Deft. Jennie B. Grosso withdrew plea of Not Guilty ent. 11/15/62 and ent. plea of GUILTY to Ct. 26 before Foley, J. (Rep. B. Cook.)
	Mar. 11	Deft. Joseph A. Pino withdrew plea of Not Guilty ent. 11/15/62 and ent. plea of GUILTY to Ct. 1 before Foley, J. (Rep. B. Cook.)

IN UNITED STATES DISTRICT COURT

INDICTMENT—Filed September 26, 1962

The Grand Jury charges:

That on or about the 29th day of April, 1958, the exact date being to the Grand Jury unknown, up to and including April 10, 1961, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso, Jennie B. Grosso and Joseph Pino, hereinafter referred to as the defendants, and Harold Hannon, Thomas LaMantia, Richard Albert, Fred Albert, Wilbert Patterson, Emma Patterson, Albert Sunner, Regal Pace, Mary Jenny Pace, Joseph Fazio, James Giles, James Savena, Ann Crosby, Anthony Pometto, Bernard Riccardi, Harry Chapman and George Nicholas, co-conspirators but not defendants herein, and divers other persons whose names are to the Grand [fol. 14a] Jury unknown, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together with each other to defraud the United States of America by impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of revenue, to wit: wagering taxes imposed (1) by Section 4401 of Title 26, United States Code, tax on wagering and (2) by Section 4411 of Title 26, United States Code, tax on each person who is liable for tax under Section 4401 of Title 26, United States Code, and who is engaged in receiving wagers for and on behalf of any person or persons so liable.

The Grand Jury further charges that said unlawful combination, conspiracy, confederation and agreement was to be accomplished by means and methods and in the manner following:

1. That during the period of times heretofore mentioned, at the Western District of Pennsylvania, the defendants, Anthony M. Grosso, Samuel J. Grosso, Jennie B. Grosso and Joseph Pino were engaged in the business

of accepting wagers and were required by law to report and pay taxes upon such wagers, so accepted by them, in the manner provided by law.

2. It was a part of the conspiracy that the defendants and co-conspirators would conceal and disguise the nature and extent of their wagering operation and the identity of those who were engaged therein.

3. It was a part of said conspiracy that inaccurate and incomplete records would be kept by the defendants in [fol. 15a] order to conceal from the Treasury Department and the Internal Revenue Service a true and accurate amount of taxable wagers placed with the said defendants.

4. It was a part of the said conspiracy that certain of the defendants and co-conspirators in order to cover up and conceal the location and the true scope of the gambling operation conducted, would engage in the business of accepting wagers without first having paid the special occupational tax imposed by Section 4411 of Title 26, United States Code, required to be paid as a condition precedent to carrying on the said business, and without having registered with the District Director of Internal Revenue, as required by Section 4412, Title 26, United States Code.

5. It was part of the said conspiracy that the defendants would cause to be made and subscribed false statements and returns to wit: Tax on Wagering, Form 730, and other returns and statements which contained written declarations that it is made under penalties of perjury, which the defendants did not believe to be true as to every material matter.

6. It is further part of said conspiracy that the defendants herein would neglect and fail to pay a substantial portion of the taxes due and payable to the United States upon all of the aforesaid wagers and the defendants herein would attempt to evade and defeat the payment to the United States by the said defendants of the aforesaid taxes in the manner and by the means aforesaid.

Overt Acts

The Grand Jury further charges that said conspirators, in furtherance of and for the purpose of carrying into execution said combination, conspiracy, confederation and [fol. 16a] agreement, did in the Western District of Pennsylvania, do and perform the following and other overt acts, to wit:

1. On February 19, 1959, Samuel J. Grosso, Jennie Gatta (now Jennie B. Grosso) and Joseph Pino met with Lillian Albert, Mary Jenny Pace, alias Mary Robinson, Gen Antanasio, Charles Cheetham, Joseph C. Grosso, Jr., Gerald Grosso at the residence of Edmund and Ruth Lovejoy in Jefferson Borough, Allegheny County, Pennsylvania for the purpose of tabulating numbers lottery wagers.

2. On April 20, 1959, Samuel J. Grosso met with Anthony Buono, Gen Antanasio, Joseph C. Grosso, Jr. and Jake Sandman in a car in the Oakland District of Pittsburgh with records of accounts relating to the numbers lottery business.

3. On March 25, 1961, Jennie B. Grosso met with Gloria Krug, Gen Antanasio, William Schaefer and Tony Capogreca at the residence of William and Alice Betz in Bethel Park, Allegheny County, Pennsylvania, for the purpose of tabulating numbers lottery wagers.

4. On or about March 30, 1959, Joseph Pino subscribed to and filed and caused to be filed with the District Director of Internal Revenue in Pittsburgh, Pennsylvania, a Form 730, Tax on Wagering, for the month of February 1959 accompanied by a letter in which Joseph Pino accepted full responsibility for the excise taxes due and owing the government and stated that the numbers lottery began on February 12, 1959 and ended on February 19, 1959.

5. Samuel J. Grosso filed or caused to be filed with the District Director of Internal Revenue, Pittsburgh, Pennsylvania, Form 730, Tax on Wagering for the month of

[fol. 17a] March 1960 wherein he stated "No Action" and reported no gross wagers accepted and reported no tax due.

6. On December 14, 1959, Joseph Pino subscribed to and filed and caused to be filed with the District Director of Internal Revenue, Pittsburgh, Pennsylvania, Forms 730, Tax on Wagering for the months June, July and August 1959, wherein it is stated the word "None", indicating no gross wagers were accepted and no tax due on each respective return.

7. On December 16, 1959, Samuel J. Grosso subscribed to and filed and caused to be filed with the District Director of Internal Revenue, Pittsburgh, Pennsylvania, Form 11-C, Special Return and Application for Registry—Wagering and failed to state the number of employees or agents engaged in receiving wagers on his behalf and failed to state the true name, address and special stamp number of such persons.

In violation of Title 18, United States Code, Section 371.

Second Count

The Grand Jury further charges:

That on or about May 31, 1958 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of April, 1958, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of April 1958 in the amount of $1,039.03, in violation of Section 7203 of Title 26 United States Code.

[fol. 18a]

Third Count

The Grand Jury further charges:

That on or about July 31, 1958, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of June, 1958, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of June, 1958, in the amount of $4,153.41, in violation of Section 7203 of Title 26 United States Code.

Fourth Count

The Grand Jury further charges:

That on or about February 28, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of January, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of January, 1959 in the amount of $1,551.86, in violation of Section 7203 of Title 26 United States Code.

Fifth Count

The Grand Jury further charges:

That on or about March 31, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. [fol. 19a] Grosso and Joseph Pino, defendants herein, who during the month of February, 1959, were engaged in the

business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of February, 1959 in the amount of $1,226.51, in violation of Section 7203 of Title 26 United States Code.

Sixth Count

The Grand Jury further charges:

That on or about April 30, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of March, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of March, 1959, in the amount of $2,258.62, in violation of Section 7203 of Title 26 United States Code.

Seventh Count

The Grand Jury further charges:

That on or about May 31, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of April, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay [fol. 20a] the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of April, 1959, in the amount of $17,011.88, in violation of Section 7203 of Title 26 United States Code.

Eighth Count

The Grand Jury further charges:

That on or about June 30, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of May, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of May, 1959, in the amount of $1,883.09, in violation of Section 7203 of Title 26 United States Code.

Ninth Count

The Grand Jury further charges:

That on or about July 31, 1959 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of June, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of June, 1959 in the amount of $1,594.47, in violation of Section 7203 of Title 26 United States Code.

[fol. 21a]

Tenth Count

The Grand Jury further charges:

That on or about August 31, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of July, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2)

of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of July, 1959, in the amount of $1,903.68, in violation of Section 7203 of Title 26 United States Code.

Eleventh Count

The Grand Jury further charges:

That on or about September 30, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of August, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of August, 1959, in the amount of $1,597.45, in violation of Section 7203 of Title 26 United States Code.

Twelfth Count

The Grand Jury further charges:

That on or about October 31, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. [fol. 22a] Grosso and Joseph Pino, defendants herein, who during the month of September, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of September, 1959, in the amount of $1,513.45, in violation of Section 7203 of Title 26 United States Code.

Thirteenth Count

The Grand Jury further charges:

That on or about November 30, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of October, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of October, 1959, in the amount of $1,658.48, in violation of Section 7203 of Title 26 United States Code.

Fourteenth Count

The Grand Jury further charges:

That on or about December 31, 1959 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of November, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail [fol. 23a] to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of November, 1959, in the amount of $4,165.43, in violation of Section 7203 of Title 26 United States Code.

Fifteenth Count

The Grand Jury further charges:

That on or about January 31, 1960 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of December, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section

7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of December, 1959, in the amount of $1,795.39, in violation of Section 7203 of Title 26 United States Code.

Sixteenth Count

The Grand Jury further charges:

That on or about April 30, 1960 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of March, 1960, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of March, 1960, in the amount of $450.00, in violation of Section 7203 of Title 26 United States Code.

[fol. 24a] Seventeenth Count

The Grand Jury further charges:

That on or about May 31, 1960 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of April, 1960, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of April, 1960, in the amount of $93.55, in violation of Section 7203 of Title 26 United States Code.

Eighteenth Count

The Grand Jury further charges:

That on or about April 30, 1961, in the Western District of Pennsylvania, Anthony M. Grosso and Jennie B. Grosso, defendants herein, who during the month of March, 1961, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of March, 1961, in the amount of $24,252.75, in violation of Section 7203 of Title 26, United States Code.

Nineteenth Count

The Grand Jury further charges:

That on or about May 31, 1961, in the Western District of Pennsylvania, Anthony M. Grosso and Jennie B. Grosso, [fol. 25a] defendants herein, who during the month of April, 1961, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of April, 1961, in the amount of $516.72, in violation of Section 7203 of Title 26 United States Code.

Twentieth Count

The Grand Jury further charges:

That on or about April 29, 1958, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso, being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as

such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-First Count

The Grand Jury further charges:

That on or about January 1, 1959, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as [fol. 26a] such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Second Count

The Grand Jury further charges:

That on or about July 1, 1959 at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Third Count

The Grand Jury further charges:

That on or about March 13, 1961, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsyl-

Eighteenth Count

The Grand Jury further charges:

That on or about April 30, 1961, in the Western District of Pennsylvania, Anthony M. Grosso and Jennie B. Grosso, defendants herein, who during the month of March, 1961, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of March, 1961, in the amount of $24,252.75, in violation of Section 7203 of Title 26, United States Code.

Nineteenth Count

The Grand Jury further charges:

That on or about May 31, 1961, in the Western District of Pennsylvania, Anthony M. Grosso and Jennie B. Grosso, [fol. 25a] defendants herein, who during the month of April, 1961, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of April, 1961, in the amount of $516.72, in violation of Section 7203 of Title 26 United States Code.

Twentieth Count

The Grand Jury further charges:

That on or about April 29, 1958, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso, being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as

such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-First Count

The Grand Jury further charges:

That on or about January 1, 1959, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as [fol. 26a] such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Second Count

The Grand Jury further charges:

That on or about July 1, 1959 at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso, being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Third Count

The Grand Jury further charges:

That on or about March 13, 1961, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsyl-

vania, the defendant Anthony M. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

[fol. 27a] Twenty-Fourth Count

The Grand Jury further charges:

That on or about April 29, 1958, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Samuel J. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Fifth Count

The Grand Jury further charges:

That on or about January 1, 1959, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Samuel J. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Sixth Count

The Grand Jury further charges:

That on or about March 13, 1961, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsyl-
[fol. 28a] vania, the defendant Jennie B. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

A True Bill,

....., Foreman.

Joseph S. Ammerman, United States Attorney.

In United States District Court

Motion to Dismiss Indictment—Filed February 18, 1963

Defendants move, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, for an order dismissing the indictment against them, and the various counts thereof, on the following grounds.

1. The indictment and each count thereof should be dismissed on the ground that it was procured by the use of unlawfully obtained evidence. Defendants' motion for suppression of evidence, filed herein, sets forth the grounds upon which defendants assert that the evidence in question was unlawfully obtained. Defendants respectfully request that this phase of their motion to dismiss be decided after the hearing and determination of the motion for suppres-
[fol. 29a] sion of evidence, and in the light of the Court's

determination as to which if any items of evidence were unlawfully obtained.

2. Counts 1 through 19 should be dismissed on the ground that payment in the required manner of the ten per cent wagering excise tax allegedly due and owing by the defendants named in each of such counts would have entailed a violation of the constitutional privilege against compulsory self-incrimination. Such payment would have tended to incriminate the defendants under both federal and state statutes; and in particular would have tended to incriminate defendant Anthony M. Grosso on the charges contained in Counts 20 through 23 of the instant indictment, defendant Samuel J. Grosso on the charges contained in Counts 24 and 25 of the instant indictment, and defendant Jennie B. Grosso on the charges contained in Count 26 of the instant indictment. Accordingly, Counts 1 through 19 fail to charge an offense for which the defendants herein may be validly prosecuted.

James McLaughlin, 606 Frick Building, Pittsburgh 19, Pennsylvania; Thomas A. Wadden, Jr., 1000 Hill Building, Washington 6, D. C., Attorneys for Defendants.

[fol. 97a]

IN UNITED STATES DISTRICT COURT

OPINION ON MOTION TO DISMISS INDICTMENT—Filed January 9, 1964

In this criminal proceeding, defendants have filed a Motion to Dismiss Indictment, Motion for Suppression of Evidence and Motion for Bill of Particulars Ancillary to Motion to Suppress. By prior Order of Court, by agreement and stipulation of the parties, approved by the Court, and by Opinion and Order entered contemporaneously here-
[fol. 98a] with this Opinion and Order, the Court has dis-

posed of the Motions for Suppression of Evidence and for Bill of Particulars Ancillary to Motion to Suppress. It is the considered opinion of the Court that the Motion to Dismiss Indictment should be denied.

Defendants contend that each count of the indictment should be dismissed on the grounds that evidence which is the basis for the indictment was procured illegally. This contention has no merit. The Court has determined that the evidence described in Paragraphs 1, 3, 10, 15, 20, 21, 23, 24 and 25 of defendants' Motion for Suppression of Evidence was legally seized and defendants have withdrawn said Motion as to those items enumerated in Paragraphs 2, 6, 7, 11, 19 and 22 of said Motion. Certainly, any count of the indictment whose basis was the evidence enumerated in any of said Paragraphs of the Motion for Suppression is not open to attack on the ground of being based on illegally obtained evidence. As to the counts of the indictment based on the evidence enumerated in Paragraphs 4, 5, 8, 9, 12, 13, 14, 16, 17, 18, 26 and 27 of said Motion for Suppression of Evidence, which the government, without conceding such evidence was obtained as a result of an illegal search and seizure, has agreed not to introduce into evidence, it is the opinion of the Court that basing a count of an indictment on illegally obtained evidence is akin to basing such count on hearsay, which clearly is permissible. See *Costello* v. *United States,* 350 U. S. 359 (1956). Therefore, even if the evidence enumerated in Paragraphs 4, 5, 8, 9, 12, 13, 14, 16, 17, 18, 26 and 27 were illegally obtained, a question which the Court expressly does not determine, the use of such illegally obtained evidence is irrelevant where the issue facing the Court is whether a count of an indictment should be dismissed.

[fol. 99a] Defendants also contend that Counts 1 through 19 should be dismissed on the ground that payment in the required manner of the ten per cent wagering excise tax allegedly due and owing by the defendants named in each of such counts would have entailed a violation of the constitutional privilege against compulsory self-incrimination,

in that such payment would have tended to incriminate the defendants under both federal and state statutes.

In the opinion of the Court the legal issues raised by this contention are of no merit, having, in effect, already been determined adversely to defendants' position by the Court of Appeals. See *United States* v. *Joseph,* 278 F. 2d 504 (3rd Cir. 1960); *cf. Lewis* v. *United States,* 348 U. S. 419 (1955); *United States* v. *Kahringer,* 345 U. S. 22 (1953).

Conclusion

Since neither of defendants' arguments for dismissing the indictment is meritorious, the Motion to Dismiss Indictment should be denied.

An appropriate Order is entered.

Order

And Now, Therefore, This 9th day of January, 1964, defendants' Motion to Dismiss Indictment will be and hereby is denied.

Wallace S. Gourley, CDJ, Chief Judge.

cc: Gustave Diamond, Esq., United States Attorney.

[fol. 100a] James E. McLaughlin, Esq., for Anthony Grosso, 606 Frick Building.

Vincent J. Fuller, Esq., for Samuel Grosso, 1000 Hill Building, Washington 6, D. C.

Thomas A. Wadden, Esq., for Jennie Gross and Joseph Pino, 1000 Hill Building, Washington 6, D. C.

[fol. 104a]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal Action No. 62-281

UNITED STATES OF AMERICA, Plaintiff,

vs.

ANTHONY M. GROSSO, Defendant.

Transcript of Proceedings

* * * * * * *

[fol. 160a] MR. W. DEAN STRUBLE, called as a witness by the Government, being first duly sworn, was examined and testified on his oath as follows:

* * * * * * *

[fol. 162a] Cross examination.

By Mr. McLaughlin:

* * * * * * *

[fol. 163a] Q. Mr. Reich asked you about these wagering stamp files, and I believe you said that the District Director keeps an alphabetical file of the names of the persons in his district who have wagering or gambling stamps?

A. That is right, sir.

Q. And, that record can be used by myself or any other person who is interested?

A. That is right, sir.

Q. It is also true, is it not, that the District Director keeps as a public record an alphabetical listing of the names of all persons who have paid special taxes, including the occupational and the excise tax on wagering?

A. Well, when the wagering tax stamp is prepared and the name is put on that stamp—well, the stamp would not be prepared until the amount of money had been paid to obtain the special stamp. It would have to have been paid for the stamp to be prepared.

Q. You wouldn't get the stamp unless you came up with the $50?

A. That is right.

Q. But, I am referring now to the tax that must be paid or is paid on a monthly basis. Is it not a fact that there is kept as a public record an alphabetical listing of persons who have paid the excise tax as opposed to paying the $50? It is not, of course, disclosed what they paid or where, but there is a record that shows that they do pay excise tax on gambling?

A. Not a record as such.

Q. What do you mean by "not a record as such"?

A. Well, it would be on an individual basis. I mean, there [fol. 164a] is no listing to indicate those that filed Form 730 for the excise tax.

Q. You are here, I believe, representing the District Director who is Mr. Bingler?

A. Mr. Bingler, yes, sir.

Q. And, there are district directors all over the United States, and there is one director or one head of your service, is there not?

A. You mean in Washington, D. C.?

Q. In Washington, yes.

A. Yes, sir.

Q. And, who is that?

A. Mr. Caplan.

Q. Mortimer Caplan?

A. Mortimer Caplan, yes.

Whereupon, Defendant's Exhibit "T" was marked for identification.

By Mr. McLaughlin:

Q. Now, so that we understand one another, Mr. Struble, when we talk about the occupational tax on wagering, we

are talking about the $50 that you pay for the stamp, is that right?

A. That is right, sir.

Q. When we talk about the excise tax on wagering we are talking about the ten per cent on the gross receipts?

A. That is right.

Q. Now, Mr. Mortimer M. Caplan is presently the Director of Internal Revenue in Washington? Commissioner, they call him, I believe?

A. Yes, sir. He was the last I heard.

Q. He is the head of the whole service?

A. Yes.

[fol. 165a] Q. Mr. Struble, do you know whether from time to time Mr. Caplan as the Commissioner of Internal Revenue and head of the whole service in the United States writes and publishes articles dealing with the service—

Mr. Reich: If the Court please—

Mr. McLaughlin: —and the policies of the service?

Mr. Reich: If the Court please, at this time I would like to interpose an objection. I don't think this witness is here as an expert on what Mr. Caplan has written in any legal publications.

The Court: Well, if he knows, he can state. The objection is overruled.

(The last question was read.)

The Court: The question is whether he knows of that matter or not.

Mr. McLaughlin: Whether he knows that Mr. Caplan does this.

The Court: Yes.

The Witness: In a general way I know that he does, yes, sir.

By Mr. McLaughlin:

Q. Have you ever read any of the articles that he has written dealing with Internal Revenue matters?

A. Quite frequently. You mean public articles or internal articles?

Q. No, articles that he writes for publication that are published.

A. I believe I have. I don't recall a specific one, though.

Q. I show you what has been marked as Defendant's Exhibit "T" for identification, and ask you if you have ever seen this particular article written by Mr. Mortimer M. [fol. 166a] Caplan entitled "The Gambling Business and Federal Taxes"? I refer you to one page there which is marked.

A. I don't recall having read this particular article. Do you want me to answer with regard to that?

Q. Well, if you haven't read the article, you can't very well—

A. Well, I thought maybe you wanted my interpretation of that particular paragraph.

Q. Well, you have read the paragraph to yourself?

A. Yes, sir.

Q. Can you give an interpretation of it?

Mr. Reich: Your Honor, I object. He is asking the witness for a legal conclusion. The witness has already testified as to what the procedures are in this district. And, as far as cross examination is concerned, I don't think the defense counsel is entitled to go any further.

The Court: I think I will excuse the jury to consider this matter.

In the meantime, ladies and gentlemen of the jury, during this recess, you will refrain from talking among yourselves or with anyone else on any matter connected with this case or form or express an opinion about the case until it is finally submitted to the jury.

The jury may be excused.

(The jury left the courtroom and the following occurred out of the hearing of the jury.)

Mr. McLaughlin: Your Honor, in order that we may have maybe a little bit better understanding of what we are going

to discuss, I would like to hand this up to your Honor and refer you to the marked part here, and you will note what I was leading to.

[fol. 167a] The Court: Thank you.

(Interval.)

Is there any question in the mind of the counsel for the government that this article was written by the Commissioner of Internal Revenue—Mr. Caplan?

Mr. Reich: No. I have no personal doubt about that.

The Court: All right. I don't know of any purpose for this except to test the knowledge of this witness.

Mr. McLaughlin: No. There is another purpose for it. We contended and have always contended—and if required to go on appeal will continue to contend—that the requirements of this Act in requiring you to pay this excise tax and take out the stamp are a violation of the privilege against self incrimination. Now, the only purpose of bringing that statement of Mr. Caplan—

The Court: You are raising the Constitutional question of the validity of the law?

Mr. McLaughlin: That is right. And, the only purpose of bringing that question on the record was to show that Mr. Caplan, or to find out whether this is a fact, that Mr. Caplan has stated that when you pay the tax as well as when you get the stamp, that the District Director keeps an alphabetical list of that.

Apparently from reading that, they don't make the returns public. But, I would gather from reading that that they keep a list of persons who, one, have the stamp and, two, who are paying the excise tax.

Now, I made the distinction between excise and occupa-

[fol. 168a] tional tax with Mr. Struble, and we got that clear. Now, the sole purpose of putting this on the record is to preserve this constitutional question.

The Court: Well, you can preserve it just as well without it being on the record, can't you?

Mr. McLaughlin: Well, it would be difficult I think. The Court of Appeals might say, "Well, what evidence did you try to introduce as to whether the record is public or not".

The Court: I mean by that, that you have tried to introduce it. Now, if the Court should sustain the objection, you have laid the foundation that you can raise the constitutional question, haven't you?

Mr. McLaughlin: Well, I might unless I got caught on the hook of them saying "You will have to go back and put something on the record".

Mr. Reich: I don't know whether your Honor is aware that this contention was raised before trial and rejected by Judge Gourley as part of the motion to dismiss the indictment. Judge Gourley has rejected the contention that the excise tax provisions of the wagering tax clause are unconstitutional and and an abridgement of the the Fifth Amendment rights of the taxpayers. And, I see no purpose in laying a factual foundation on this record to advance such a contention later.

Mr. McLaughlin: No question about Judge Gourley having ruled on it. But, I am not talking about anybody ruling on it now.

The Court: Well, you have enough in the record to serve your purpose on appeal, haven't you?

Mr. McLaughlin: Well, that was just a legal argument. Factually it wasn't gone into much either way or the other. [fol. 169a] The Court: Was it a ground of the motion to quash?

Mr. McLaughlin: No. It was a separate motion to dismiss.

The Court: It was not a part of the motion to quash?

Mr. McLaughlin: On the motion to dismiss, the constitutional question was certainly raised.

The Court: And, that has been ruled on by Judge Gourley?

Mr. McLaughlin: Oh, yes. I wasn't going to press this much further, but this gentleman seemed to—

The Court: Well, that is the law of the case, I would think.

Mr. McLaughlin: Well, not to this extent, your Honor. When a trial court rules on a motion, say, to dismiss an indictment, that sort of thing usually doesn't preclude a defendant from putting something in or adding something to the actual trial record which he feels is necessary for an appeal.

The Court: Well, you have it on the record your contention that you would make before the court of appeals that gambling, being illegal and the fact that there would have to be publication or the names made available to the public of persons who are so engaged in the gambling business, that this violates the constitutional provision? Is that your position?

Mr. McLaughlin: Almost. The constitutionality of the wagering tax has already been upheld as not being a violation of the privilege against self-incrimination for the simple reason that by taking out the stamp you aren't admitting that you are in the business of wagering, because you may not have done it yet. However, by paying the tax, [fol. 170a] the excise tax, the ten per cent, there of course you are clearly indicating that you are in the operation of a lottery or whatever the type of gambling is.

The Court: Well, now, if you pay the tax, don't you waive the constitutional question? If you want to stand on the Constitutional question that the tax is illegal by being in conflict with the Constitution, why should you pay it? Why did you pay it?

Mr. McLaughlin: Well, if you don't pay it, you go to jail.

The Court: Don't you have a chance to go to court?

Mr. McLaughlin: If you do pay it—

The Court: Can you be convicted without a trial?

Mr. McLaughlin: Oh, you can't be convicted without a trial, but—

The Court: Or, can you be placed in jail without the right of bail while awaiting a trial?

Mr. McLaughlin: If it is public, your paying of the tax is made public if they keep a list of it.

The Court: Yes.

Mr. McLaughlin: While gambling isn't against the laws of the federal government, it is in this case and in this state against Pennsylvania Law. So, you are automatically admitting to the Pennsylvania authorities that you have engaged in an illegal activity, you see.

The Court: Well, the same thing about a person who has to pay a narcotics tax. The government taxes narcotics right along. I don't know of any state that authorizes the sale and use of narcotics except through proper channels [fol. 171a] for medical treatment by a physician. What is the difference in the situation?

Mr. McLaughlin: Well, I don't intend to belabor the thing at all.

The Court: I am going to sustain the objection. The objection is sustained.

* * * * * * *

[fol. 236a]

MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF GOVERNMENT'S EVIDENCE—Filed February 18, 1964

And Now come the defendant, Anthony M. Grosso, by his attorney James E. McLaughlin, Esquire, and moves for a Judgment of Acquittal as to all counts of the Indictment at the close of the Government's evidence, for the reason that such evidence is insufficient as a matter of law to sustain a conviction. Specific grounds which relate to the respective counts are set forth hereinafter.

The grounds which relate to Count One of the indictment are as follows:

1. The Government has failed to prove there is a tax liability due and owing and thus has failed to prove the essential intent to defraud. This ground is more fully set forth in Secs. II and III of defendant's memorandum, at pp. 4-10.

2. The inadmissibility of Government Exhibit One renders the evidence on this Count insufficient. This ground is more fully set forth in Sec. IV of defendant's memorandum, at pp. 11-15.

3. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401. This ground is more fully set forth in Sec. VI of defendant's memorandum, at pp. 16-18.

4. The Government has failed to prove defendant could have paid the excise tax without risk of self-incrimination in violation of his Fifth Amendment rights. [fol. 237a] This ground is more fully set forth in Sec. VII of defendant's memorandum, at pp. 18-21.

5. The Government has failed to prove the conspiracy alleged in Count I in that it has failed to prove the purpose of the alleged conspiracy was to defraud the United States; and in that its proof tends to show multiple conspiracies rather than the single conspiracy alleged. This ground is more fully set forth in Sec. IX of defendant's memorandum, at pp. 21-23.

The grounds which relate to Count Two of the Indictment are as follows:

1. The Government has offered no proof of excise tax liability for this period covered by this Count. This ground is more fully set forth in Sec. I of defendant's memorandum, at pp. 1-4.

2. The Government has failed to prove that there is a tax liability due and owing by the defendant on this count, because it has not shown whether the excise tax was paid by the writers or branch managers. This ground is more fully set forth in Sec. II of defendant's memorandum, at pp. 4-9.

3. The Government has failed to prove the alleged excise tax liability has not been paid by the defendant's alleged partners. This ground is more fully set forth in Sec. III, of defendant's memorandum, at pp. 9-10.

4. The inadmissibility of Government's Exhibit One renders the evidence on this count insufficient. This

[fol. 238a] ground is more fully set forth in Sec. IV of defendant's memorandum, at pp. 11-15.

5. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401. This ground is more fully set forth in Sec. VI of defendant's memorandum, at pp. 16-18.

6. The Government has failed to prove defendant could have paid the excise tax without risk of self-incrimination in violation of his Fifth Amendment rights. This ground is more fully set forth in Sec. VII, of defendant's memorandum, at pp. 18-21.

7. The Government's proof shows a different partnership from that alleged in the indictment. This ground is more fully set forth in Sec. VIII of defendant's memorandum, at p. 21.

The grounds which relate to Counts Three through Fifteen are the same as the grounds specified with respect to Count Two, with the exception of the ground set forth in Paragraph One of such grounds.

The grounds which relate to Counts Sixteen through Eighteen are the same as the grounds specified with respect to Count Two.

The grounds which relate to Count Twenty of the Indictment are as follows:

1. The Government has failed to offer proof of any amount of excise tax liability for the month to which this count relates, and accordingly, has failed to establish the occupational tax liability alleged in this [fol. 239a] count. This ground is more fully set forth in Sec. I of defendant's memorandum, at pp. 1-4.

2. The inadmissibility of Government's Exhibit One renders the evidence on this count insufficient. This ground is more fully set forth in Sec. IV of defendant's memorandum, at pp. 11-15.

3. The Government's own proof establishes that one or more of defendant's alleged partners had an occupational tax stamp during the period covered by this count, and thus negates defendant's liability for the occupational stamp alleged in this count.

4. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401, and thus has been erroneously charged under Sec. 4411. This ground is more fully set forth in Sec. VI of defendant's memorandum, at pp. 16-18.

Counts Twenty-One and Twenty-Two of the Indictment are the same as the grounds specified with respect to Count Twenty, with the exception of the grounds set forth in Paragraph One of such counts.

The counts which relate to Count Twenty-Three of the Indictment are the same as the grounds specified with respect to Count Twenty.

James E. McLaughlin, Esquire, Atty. for Deft.—
Anthony M. Grosso.

Submitted: February 18, 1964.

[fol. 321a] PROCEEDINGS

Friday, March 6, 1964, 11:45 a. m.

The Court: Let the record show that the Court is in session.

The defendant's counsel is present and the defendant is absent. Will you waive the presence of the defendant?

Mr. McLaughlin: Yes, your Honor.

The Court: And also stipulate that the proceedings had here will have the same force and effect as if they were done in open court in a regular session of the Court?

[fol. 322a] Mr. McLaughlin: Yes, your Honor.

The Court: All right.

I ask counsel this question, this to Mr. McLaughlin, counsel for the defendant; if he would consent to having the Court order the jury to resume deliberations this afternoon, during this afternoon, because the doctor has informed me that she would be ready in four or five hours physically to resume her work, and that call came in here to this room about 10:30 this morning.

I will now ask counsel whether or not he will consent to having the jury resume deliberations this afternoon.

Mr. McLaughlin: Counsel for the defendant will not or does not consent, your Honor, to the jury resuming its deliberations this afternoon, and moves for a mistrial and/or the discharge of the jury at this time for the following reasons; and these reasons are the reasons why the counsel for the defendant does not consent.

The jury has been out for many, many hours now. On the evening of the second day of deliberations, counsel for the defendant was informed that one of the jurors had taken ill and required medical attention. Shortly thereafter, some time after 11:00 last night, counsel for the defendant was informed that a second juror had taken ill and also required medical attention.

Counsel for the defendant was informed this morning that the first juror who needed and required medical attention had some type of a relapse or set-back this morning and required further medical attention, and that the doctor indicated that she needed four or five more hours' rest before she could begin—before he could say that she could be able to deliberate again as a juror.

The juror was medicated, I understand, although I don't know what type of medication she has had, and I think [fol. 323a] the type of medication she has had, depending on what it is, could well affect her judgment. If she got ill last night and got ill again this morning, she is obviously not in the best physical condition, and I don't feel that she

should be subjected to any further deliberation, and I don't think defendant should be required to have his fate decided by a jury some of whom, perhaps two, at least one we know, are not now well.

As I understand it, the diagnosis is that she had some sort of a neuro circulatory edema, and, of course, it is impossible to tell what effect this has on other jurors. No one knows, of course what the status of the jury is at all, but we do know that some time yesterday morning, I believe the jurors sent word to your Honor that even at that early hour they were unable to agree; at least, that was the report that was given to me by the U. S. Attorney, that they had sent word down before lunch, about 11:30, that they were unable to agree and they were told to continue work. Obviously, they did continue working at the direction of the Court, and then at the end of the day, these two persons got ill.

I feel that they have been out long enough, and this fact of the illness of one juror and the illness of another could well in this circumstance result in some sort of a compromise verdict, and for that reason, we would move that the jury be discharged.

Also, so the record shows, the jury has been separated, at least to some extent. Of course, in all fairness to the Court, I will put on the record what I said to the Court last night. When consulted, I, of course, stated I had no objection to any of the jurors who were ill getting medical attention. Obviously, no attorney is going to take the position that a juror should be permitted to die on the court-[fol. 324a] room floor for want of a doctor. However, there has been, to some extent, a technical separation. I don't know what the circumstances are today. I don't know whether she is with the rest of them or separated from them.

The Court: She is with the rest of them. The doctor so informed me.

Mr. McLaughlin: There at least has been a technical separation.

So, for all those reasons, we would move that the jury be discharged.

The Court: Are you through?

Mr. McLaughlin: Yes, your Honor.

The Court: All the members of the jury apparently were working up until just a few minutes before 11:00 p.m. last night. At that time, I received a telephone call from the clerk, who has acted as clerk throughout this trial, that the jury was retiring for the night, going to a hotel.

Now, during this trial, since the case has been submitted to the jury, I have been available to the clerk and, through him, to anyone else interested in the case that might want to reach me for some reason, but the only conversations I have had with anyone up to 11:00 last night was with the clerk.

So, he informed me that the jury was on its way or going to retire for the night. Shortly after that, I don't know just how long it was, I was informed that one of these ladies was injured. I think she was on her way into the elevator, wasn't she?

The Clerk: She was on her way to the elevator, your Honor.

The Court: Going to the hotel?

The Clerk: To the hotel.

[fol. 325a] The Court: So, I think I inquired of the clerk whether the lawyers were available or where they were at the time. I think he said Mr. McLaughlin was around, wasn't he, and Mr. Reich and Mr. Diamond were both around.

The Clerk: I had to call Mr. McLaughlin. He wasn't here at the time and I called him and asked that he would come in. Mr. Diamond and Mr. Reich were present.

The Court: I think I requested you to inform counsel, didn't I?

The Clerk: That is correct, sir.

The Court: Well, then, I received another call to the effect that the second lady had become ill. I don't know how long after that was. I think I had the conversation

with Mr. McLaughlin where we talked about this being a sort of an unusual situation.

Shortly after I finished that conversation, I was informed by the clerk that the second lady had become ill.

I was also informed by the clerk that these two ladies were brought in this room, and the clerk has stated today that the other members of the jury were outside.

The Clerk: In this courtroom, sir.

The Court: In this courtroom, which is about 20 feet away from her, or 25 feet.

Did the doctor come here?

The Clerk: The doctor came into this room, yes.

The Court: How long was he here with them?

The Clerk: I presume something like 15 to 20 minutes, possibly. That is my recollection of the time.

The Court: After that, what was done with the two sick ladies? Was there only one here at that time, one sick woman?

The Clerk: There were two here. I wasn't in here at all. I didn't know who they were. I saw the doctor going down [fol. 326a] the hallway with a marshal and I asked him about their condition, and I told him I would like to have you talk with him.

The Court: Well, do you know how long after the doctor left that these two ladies joined the rest of their associates on the jury?

The Clerk: I would say a few minutes; maybe five minutes at the most, they were taken back into this courtroom.

The Court: How long, from what you saw last night, were they separated from the body of the jury; from the other members of the jury, approximately?

The Clerk: Possibly three-quarters of an hour at the most.

The Court: No more than an hour, at any rate?

The Clerk: That is right, that is my approximation.

The Court: And they have been together ever since and they are still together?

The Clerk: They have been ever since, and they are still together at the hotel, sir.

The Court: So there is only a separation involved here of an hour at the most?

The Clerk: That is correct, to my recollection.

The Court: An hour at the most?

The Clerk: Yes, sir.

The Court: So I am going to deny the motion for a mistrial and I am going to order, and it is ordered that the jury resume deliberations this afternoon in the regular place provided by law and the authorities here in this building for that purpose. I don't know if it is provided by law or not, but it is provided by the authorities in control of this building.

Now, if it should appear that she is not able to participate in the work of the jury today, we will meet again [fol. 327a] tomorrow morning at ten o'clock to see what her condition is and see whether she can do it or not.

Mr. Reich: Your Honor, if I may—

The Court: I want to hear from you. If you have got anything to say, I would like to hear from you.

Mr. Reich: I don't want to say anything about the merits because Mr. Diamond is going to speak on that, but to supplement your narration of the facts, I think the record should show two more things.

It is my understanding that the entire time the two jurors were separated from the rest of the jury, and I think Mr. Rittinger can verify this, they were under the supervision of one of the marshals who was sworn to talk to them. They were under supervision so that no one else could talk to them.

The Court: I am glad you mentioned that. It is true, isn't it?

The Clerk: That is true. I had a marshal placed at the door so no one could look in the door or communicate with them.

The Court: And there was no contact by any other person with those jurors while they were in this room, except the doctor and a marshal?

The Clerk: And the two bailiffs that were sworn to take care of them.

The Court: Yes, and the bailiffs.

Mr. Reich: In addition to that, I understand that Mr. Rittinger personally advised and instructed the doctor not to discuss any aspect of the case with either juror.

The Clerk: I did so, and he said that was part of his medical ethics. He said he would not. He said he didn't even know the names of the two patients whom he had treated.

[fol. 328a] The Court: I see.

Mr. Reich: I think that would complete the part about that.

The Court: I am glad you mentioned it. I had that in mind and I forgot it.

Mr. Reich: And also the other ten jurors were under the supervision of other bailiffs.

The Court: They were under supervision, were they not, or were they?

The Clerk: At the same time, sir.

The Court: And no one was in contact with them at any time? No one has contacted any member of this jury since it was submitted to the jury?

The Clerk: Not at any time to my knowledge.

The Court: Except those who are duly authorized by law to do so?

The Clerk: That is correct, sir.

The Court: And for the purposes authorized by the law and no other purpose?

The Clerk: That is correct.

The Court: Now, anything else?

Mr. Diamond: Yes. The Government takes the position, as the Court has already ruled, that the jury should continue their deliberations. This case has taken, as we all know, five weeks to try. The Government introduced some 76 exhibits; the defendant over 30 exhibits; there are 21 counts that the jury has to consider against this defendant. Under those circumstances, it is not unusual that a jury

would not agree after one day's deliberations and, in fact, would be most unusual if they did agree in such a period of time.

We think also that notwithstanding the Court's clear instructions on the point, it is possible the jury doesn't un- [fol. 329a] derstand what a deadlock is. The jury may feel that if they can't agree on all points, they are deadlocked; and in that regard I will have something to say at the end of this.

Now, as to the separation of the jury, I think there has been, at most, as Mr. McLaughlin indicated, a technical separation, not a separation as one might expect if a juror was permitted to go home or to be in the presence for any period of time of individauls who have not been instructed directly or indirectly by the Court as to not speaking with a juror concerning the case. I think we all know that during the course of deliberations a jury is many times separated in a sense. Jurors have occasion to go to the washroom and there is a separation for a period of time then. When they go to the hotel, I don't think that they are always all in the same room. Obviously they are not; the men and the women are separated. These separations are recognized in the law and they are not at all improper.

For that reason, we don't think that the question of separation here in any way vitiates the deliberations of the jury or would require that a mistrial be declared.

It would be the request of the Government that when the jury is returned for deliberations, that prior to entering into their deliberations again, the Court reread the last instruction, Instruction 35, with emphasis on that portion of the instruction which indicates that the jury may agree on a count or a number of counts and disagree as to others and point out that such a verdict would not be improper, and that if the jury does not agree on all points, they are not deadlocked; and the jury should be instructed that when they have arrived at a verdict as to any count they may return that verdict to the Court.

[fol. 330a] The Court: Well, I think the order that I made covers the views expressed by counsel here.

Mr. Diamond: It does.

The Court: Now, we have an instruction there as to counts; that they can convict on one count, acquit on one count, and so on and so forth, or disagree to one or more of the counts.

Mr. Diamond: That is already in your Honor's instructions.

The Court: I doubt that that is the trouble. I think that they have probably read the instructions pretty carefully, because I gave them the instructions. It illustrates one of the views that I have on that question. It is impossible for a body of laymen to sit and listen to a judge read something for an hour and take very much out of the courtroom with them. I think that making a rule to the contrary would be just taking the wind out of all the instructions. There would be no effect to them at all, or a good many of them. The jury would never think of some of them again, especially in a long trial where there are a good many instructions.

Well, that is the way it stands. Now, I don't know how I will act on that suggestion. If they meet today and we find out tomorrow they are still in disagreement, I might call them in about one o'clock tomorrow afternoon and ask them if there is any possibility of agreement. I am not going to ask them how they stand numerically, that is contrary to the decision of our Supreme Court. I am not going to do that, but I am going to ask them if there is any hope of an agreement. I don't see any objection to that.

Mr. McLaughlin: No, I have no objection to that. We would object to there being some sort of a special charge this afternoon. I don't think there is any need for it. You [fol. 331a] have given them your instructions, which was over my objection, anyway, but at least they have them now.

The Court: And I might then call their attention to some of these instructions again on this very point.

Mr. McLaughlin: At this point, they haven't asked for any further instructions and I think today it is premature.

The Court: And there is another reason why I don't believe that that is the problem; because the formal verdict, they have got that, and that shows on its face that each count is treated separately in that verdict. Each paragraph pertaining to a count there is a separate verdict of itself, so it is not likely that that would be a question. Now, I don't know what else we can do.

Mr. McLaughlin: There is just one other thing, your Honor, I would like to put on the record; at least one other request I would like to put on the record. That is, as I understand, one of these jurors has been given some kind of medication.

The Court: Pills, that is all I know, for her nerves.

Mr. McLaughlin: I think, just to keep the record straight and for the purposes of the record, some efforts should be made to determine what the type of medication is and put it in the record.

The Court: I want to avoid suggesting ideas to counsel, but the thought occurred to me as you mentioned that before that if there is a conviction in this case, you could find out from the doctor; and if you need a court order to find out, you will get one to find out the nature and the effect of the medication that was given to this individual, and we can get the doctor here and get an opinion from him whether or not it was such a type that would cause a person to be incapacitated to think normally; and, if so, how long that condition would endure.

[fol. 332a] Now, if she is in there two or three days, that point is minimized. If she would go right in and the jury would walk right out with a verdict, there might be some question of whether or not she was—a vague question and a very slight fly speck of a question. I don't think that any doctor would say that a woman could go and resume jury duty after he has prescribed something that would act as an opiate or curtail her mental activity in any degree. I don't think a doctor would do that, but I am going

to see that you have an opportunity to make a motion or two for a new trial. That is where that could come up.

Mr. Diamond: In that same vein, I am not sure that the record is clear on this. As I recall, and Mr. McLaughlin and I were in the presence of the doctor when he was discussing this with your Honor last night, the doctor indicated—

The Court: You were present when the doctor was speaking to me, were you?

Mr. Diamond: Yes, sir, we were in chambers.

The Court: Was Mr. McLaughlin there, too?

Mr. McLaughlin: Yes.

Mr. Diamond: Yes, he was, and that was at Mr. McLaughlin's request.

The doctor indicated that the jurors who had been ill were in no danger, that they need not be separated. As a matter of fact, I believe he also indicated that they did not want to be separated from the other jurors and that they could resume their deliberations. And as I recall, it was stated here this morning—although I certainly haven't spoken to the doctor—the doctor indicated that the juror that he treated this morning would be able to resume deliberations after four or five hours, and that was at some time after ten this morning, and four or five hours would be after two this afternoon, something in that area.

[fol. 333a] The Court: I would like also to have the marshal informed—I think we talked about it before—not to remove either one of these ladies to a hospital without instructions of the doctor. If the doctor says either one of them should go to the hospital, that is it. Their comfort and their health is more important than a lot of other things we have to contend with.

Doesn't that cover everything now?

Mr. Wadden: Could you indulge us just one minute, your Honor?

The Court: Certainly.

(Discussion off the record.)

Mr. McLaughlin: There is one other point that I think should be considered, and that is the doctor has indicated, apparently this morning, that this juror should be able to deliberate again after four or five hours' additional rest and whatever medication she has taken; and that, of course, is obviously the doctor's opinion. I think some effort should be made to determine—this could be made by the Court through the marshal—whether the juror herself feels personally that she is able to continue. In other words, some times a doctor can look at me and tell me, "You ought to feel pretty good—"

The Court: I think that the marshal would probably ask her how she feels and he wouldn't take her down to the jury room until she felt that she could. You can call the marshal's attention to that. I hate to do it because I think it is obvious that he would do that. He would find out if she was ready to go, and if she wasn't and she said she wasn't quite ready, he would wait a little while longer and then ask her again and then get in touch with the doctor.

[fol. 334a] The Clerk: I will see that the information is conveyed to the marshal.

The Court: I am sure that he would do it, regardless, and you tell him how I felt about it. I am sure he would do it without the suggestion, but I am doing it on request of counsel.

Mr. Reich: Your Honor, we have one further thought over here. As we were discussing before, this is the first time within the memories of all of us that such an event has occurred, and we are sure that because of this event the jury is somewhat confused at this point and may be somewhat excited, and it is our feeling that perhaps your Honor, when they do continue deliberations this afternoon, could call them back into court and reassure them—nothing in the nature of a special charge, but maybe a reassuring word to them would have a very beneficial effect in view of what has gone on in the last 24 hours or so.

The Court: Well, I will have to stop and think about that for a moment. They know the ladies were sick and they know that they both had medical advice from the doctor. They know why they haven't been in session, and they will know that she is ready to go. She will talk to them and tell them. I don't want to do that. I appreciate your bringing the thought up, but I don't think I wish to do that. They will go back to work and it doesn't make much difference whether they have any explanation, really, for this delay or not. They can blame the judge for it; they won't blame counsel for it, but as a matter of politeness, I would bring them into court and inform them if I didn't think they already knew.

Mr. McLaughlin: As they say, if they have all been together, they must know.

The Court: I think so. I don't think it is necessary to [fol. 335a] do that. The less that the Court has to do with them in bringing them in and bringing them out, it is better. They sometimes get ideas that the Court—ideas as to what the Court has conveyed to them and entirely opposite of what the Court wanted to convey to them. I will just leave them alone and let them go back to work without any more ado. That is what I think.

Mr. McLaughlin: That is what I think.

The Court: Now, what else is there? Do you have something?

Mr. Wallace: Do you think we should now call these families of these jurors?

The Court: I am going to ask the clerk to communicate with the families of the jurors and tell those other than the families of these two sick ladies that it is not their juror that is sick, and then to notify the families of the two ladies, the condition that these ladies are in so that they won't be unduly alarmed. I think we brought that up before and counsel thought it was a good idea too.

Mr. McLaughlin: Yes.

The Court: So that is everything we can do.

(Whereupon, at 12:20 p. m., a recess was taken.)

PROCEEDINGS

Saturday, March 7, 1964, 2:45 p. m.

The Court: Let the record show the presence of the defendant with counsel, and the United States Attorney and his assistant, Mr. Reich, are here; Mr. Diamond and Mr. Reich.

Can we stipulate that the proceedings had here will have the same force and effect as if they were done in open court?

[fol. 336a] Mr. McLaughlin: Right.

Mr. Diamond: Yes, your Honor.

JURY DELIBERATION AND SENTENCE

The Court: The jury having resumed deliberating, it is apparent that it is possible that we will be engaged over Sunday, I have asked counsel if they would stipulate that a marshal may escort them to the church of their choice tomorrow, tomorrow being Sunday, whichever church they wanted to go to.

Mr. McLaughlin: We would stipulate that if they are still in deliberations. I have something to say about that and I guess it can go on the record now.

The record already discloses that yesterday, of course, I made a motion to have the jury discharged. I made a motion for a mistrial. I don't know whether it appears of record or not, but the jury, as I understand, did not deliberate yesterday at all, to my understanding of it.

The Court: Is that so? Is that the fact?

Mr. Diamond: I believe they did not.

Marshal Berry: They did not.

Mr. McLaughlin: That is my understanding.

The Court: All right.

Mr. McLaughlin: I understand, and I know, that a certain juror who was ill yesterday apparently had some further difficulty this morning and was seen by a Dr. Stoffan. After we met here this morning, I called the doctor, Dr. Stoffan, to find out not who she was, nor did

he tell me, but just generally what her condition was. He told me that, say, about 12:15 today, in his opinion she was extremely sick, she was suffering from total nervous prostration. He said in his opinion he didn't see how she —he said he was going to see her again tonight—he didn't think that she would be in shape to deliberate any more [fol. 337a] today or even tomorrow, and that he felt she was suffering from not only nervous prostration, but he said that in his opinion an acute mental depression, which he termed a neurosis, and for which he said he thinks she is going to require psychiatric care.

Now, in view of that, in view of her being in that condition, if that is the opinion of the doctor, which it is, I assume, since he told me over the phone, and as far as I know no other medical person has seen her—in other words, he was the doctor that was selected by the Government, or actually I think by the Assistant District Attorney of Allegheny County, the other night, on Thursday night, I guess. If that is his opinion, and it is, it appears to me that this woman is not in condition to properly deliberate and properly evaluate the situation. Certainly anyone who is going to need psychiatric care and who is in a deep mental depression is just not timber for good jury deliberation.

So, as I say, if they were going to deliberate tomorrow, I would have no objection to anyone going to church. I feel at this time it is incumbent, in view of what Dr. Stoffan told me, to again renew my motion for a mistrial and to discharge the jury. I feel that with the woman's condition such as it is, she is just being imposed upon severely and she is not in the kind of mental condition that is required of a dispassionate consideration and discussion of the issues involved here.

Accordingly, we renew our motion for a mistrial based on the opinion of the doctor selected by the Government to examine this woman.

The Court: Would you consider stipulating that this case could continue under Rule 23, Subdivision (b), with a jury of eleven?

[fol. 338a] Mr. McLaughlin: I had given that some consideration, your Honor. I am familiar with the practice under that rule, but we have determined that it would not be in the best interest of our client to so stipulate.

The Court: What has counsel to say?

Mr. Diamond: At the very outset—

The Court: Mr. Diamond.

Mr. Diamond: —I would like to clear up something on the record. I hope Mr. McLaughlin didn't mean it the way it sounded, but the other evening, Thursday evening, when this juror became sick about 11:15 or so at night, I think just about everyone who was in the area of the courtroom was attempting to get medical attention for that sick juror. I tried to get medical attention, Mr. Reich called, I don't know whether some of the other individuals that were also on the phone—the primary object was to get immediate medical attention. We didn't know what her problem was or how serious it was.

Mr. William Claney Smith, whom we have heard mentioned before, happened to have been with us that evening. He knew of a doctor and he called Dr. Stoffan, who I think we are all happy was able to get down here. I believe also we had contacted your Honor and your Honor had indicated that we should attempt to get medical attention. We called the Physicians' Emergency number where we had hoped to be able to get someone to come down at that hour of the night. We didn't have any immediate success there. We called several of the downtown—one of the downtown hotels for their house physician because I thought that would be closer. We called Allegheny General Hospital, and the first one that we were able to get to come down here was Dr. Stoffan. The doctor wasn't picked by the Government; the doctor was picked by [fol. 339a] necessity. So, I would like the record to be clear on that particular point.

Mr. McLaughlin: We have no objection to the doctor.

Mr. Diamond: I am sure you don't Mr. McLaughlin.

Now, I don't know what the doctor's report is on the current physical condition of the juror. It is apparent that they are all here now. I know of no request having been made by the juror to be excused because of medical reasons. I should think that the doctor would get in communication with the Court before if he felt that the juror wasn't capable of further deliberations, that he would have advised the Court and not defense counsel. Certainly, the statements of defense counsel are not evidence in this case in any way at this particular time.

This jury has been deliberating probably no more than 15 hours. The particular juror has had a day and a half, almost two days of constant rest, and certainly medical attention has been afforded her during that particular period of time. This case took a month to try, over a hundred exhibits are in evidence. There is important interest at stake, not only for the defendant but for the Government as well, and I don't think that we should lightly dismiss this jury at this time unless we have some firm indication from an impartial source, or perhaps from the juror herself that she is unable to continue her deliberations.

The Court: Evidently, the doctor hasn't seen this lady since rather early this morning, has she?

Mr. Berry: No, the doctor was there this afternoon.

The Court: He was there this afternoon?

Mr. Berry: That is right.

The Court: What time was he there?

Mr. Berry: I believe it was around 1:00, 1:15.

[fol. 340a] The Court: Did he have anything to say at that time?

Mr. Berry: Nothing direct from the doctor.

The Court: Did you hear him say anything to the effect that she would not be able, mentally or otherwise, to participate?

Mr. Berry: Well, Judge, suppose I bring in the chief deputy who was in contact with the doctor. Would that be all right?

The Court: Yes.

Mr. Berry: Judge, I was in error, that was 9:35 this morning that she was examined the last time.

The Court: Oh, 9:35?

Mr. Berry: Yes.

The Court: I think we had heard—

Mr. McLaughlin: That is what the doctor told me, that he had seen her around 9:30.

The Court: And I think in some former conference we had here the marshal or deputy marshal told us what the doctor said, didn't he, at that time?

Chief Deputy Marshal Morphy: Yes, sir.

Mr. McLaughlin: Not today, not this morning.

The Court: Did you hear the doctor talking to this lady, whoever she may be, at 9:35 or approximately that time this morning?

Mr. Morphy: No, sir, I was here this morning when my deputy called, but I talked to the doctor personally at about 9:45. He did see her about 9:30.

The Court: And did he describe her condition to you?

Mr. Morphy: He stated that she was suffering a psychiatric depression at that time to me, and he stated then that he would probably be back at 7:00 this evening after he eats supper.

Mr. McLaughlin: That is what he stated to me, too, that he was going to come back tonight.

[fol. 341a] The Court: And did you discuss with him the possibility or probability of her being able to resume work and deliberations as a juror?

Mr. Morphy: Yes, I did.

The Court: What did he say?

Mr. Morphy: He stated it would be entirely up to the juror herself as to her condition.

The Court: Whether she would be able to do it or not?

Mr. Morphy: Right.

The Court: Do you want this witness sworn to testify?

Mr. McLaughlin: I don't think he need be sworn.

The Court: Do you care to have the marshal sworn?

Mr. Diamond: No.

Mr. McLaughlin: I guess he ought to be identified by name, though.

The Court: Yes, let's do that.

State your name.

Mr. Morphy: Robert S. Morphy, Chief Deputy United States Marshal.

The Court: In this district here, the Western District of Pennsylvania?

Mr. Morphy: Yes, the Western District of Pennsylvania.

The Court: Is there anything further you would like to ask the deputy marshal?

Mr. Morphy: I would like to state further that as I spoke to the doctor, I also told him or asked him if he would be on call if I needed him for any emergency medical treatment for her, and he stated that he would be. My chief concern was for the juror.

The Court: Has the jury yet resumed deliberations?

Mr. Morphy: As far as I know.

The Court: With this particular lady, the sick lady present?

[fol. 342a] Mr. Morphy: She is in the group of twelve jurors, yes, sir.

The Court: Did you see her?

Mr. Morphy: Yes, sir.

The Court: How did she appear to you?

Mr. Morphy: She seems a little weak. She walked in, she got into the cab under her own power, and she walked in with one of the other jurors in the courtroom as we came down the hall. She walked from her room to the elevator, from the elevator to the taxicab, and also from the cab to the deliberation room.

The Court: Did you have any conversation with her?

Mr. Morphy: Only as to how she felt, and she told me a little bit weak.

Mr. Diamond: May I ask something?

The Court: Yes, sir.

Mr. Diamond: Did she indicate that she did not want to come down?

Mr. Morphy: When we left the room?

Mr. Diamond: Yes.

Mr. Morphy: No, sir, she didn't.

Mr. McLaughlin: As I understand it from what I heard from the doctor, she tried to get up for breakfast and her knees just sort of buckled, or something, and, in other words, she went back to bed.

Mr. Morphy: This morning? That may be possible. I wasn't in the room. One of the women deputies was in the room.

The Court: The doctor didn't tell you that her knees buckled, did he?

Mr. Morphy: No, sir.

The Court: Or she didn't tell you that?

Mr. Morphy: No.

[fol. 343a] The Court: Is there anything further?

Mr. Diamond: I have nothing further.

Mr. McLaughlin: No, I have nothing further from Mr. Morphy.

Mr. Morphy: Thank you, your Honor.

The Court: Much obliged to you, sir. Thank you.

This may be in the record without the formality of swearing the witness?

Mr. McLaughlin: Mr. Morphy's statement, yes.

The Court: It will have the same effect as if he was sworn?

Mr. McLaughlin: Yes, sir.

Mr. Diamond: Yes, your Honor.

The Court: Now, what is the question we were interested in here?

Mr. Diamond: You were inquiring as to whether Mr. McLaughlin would stipulate that the jurors—

The Court: Oh, yes, and he signified that it is his desire not to do so.

So, I think that we can come to recess now awaiting the pleasure of the jury.

Mr. Diamond: I think the record should show, of course, that the Government is willing to stipulate that the jurors may go to the church of their choice tomorrow.

The Court: Of course, you haven't done so. Go ahead, sir.

Mr. Diamond: And also, we would at this time suggest to the Court that perhaps the Allen charge might be in order.

Mr. McLaughlin: We would object to the Allen charge being given at this time, particularly, for the reason that with one juror feeling not well, since she indicated she feels weak and the doctor has said that she is suffering from some sort of a psychiatric depression.

[fol. 344a] The Court: I won't give it at this time.

Mr. McLaughlin: I think it is just too much at this time.

The Court: I won't give it at this time.

Mr. Diamond: Very well.

The Court: I will consider doing so at a later time.

Mr. McLaughlin: So the record is clear, do I understand that my renewed motion is denied?

The Court: Yes.

And it can be arranged that these people can have a deputy marshal take them to the church of their choice? I hope they don't go to twelve different churches.

Mr. Berry: Well, Judge, we will arrange it so they can all get to church.

Now, are they to deliberate tomorrow?

The Court: I don't see any reason why they couldn't. A verdict can be returned on Sunday, can't it? Let's look and see. I am pretty sure it can.

The reason that I made that remark is that if the rule contemplates a verdict coming in on Sunday, it contemplates also deliberation on Sunday. It is not a non-judicial day in the federal system, is it, Sunday?

Mr. Diamond: Not to my knowledge.

The Court: If the case has been given to the jury, I don't see why they should have to sit around and play cards all day or twiddle their thumbs. I don't see why they couldn't continue to work.

Mr. McLaughlin: I don't know. It has never come up.

The Court: Let's look at that book, Rule 31. I am pretty sure that a jury's verdict can be received on Sunday.

Mr. Reich: I don't think it is mentioned specifically.

The Court: I can't see any objection whatever to the jury deliberating on Sunday. Do you know of any?

[fol. 345a] Mr. McLaughlin: I don't know of any. I have never even heard of it, to tell you the truth; in my experience it has never occurred.

The Court: I wonder if there is anything under Title 28 on holidays.

Mr. Morphy: Your Honor, to make the record exactly right, I have a note of when I was talking to the doctor of just what he said. I talked to him at 9:55 this morning, A. M., and he gave me, "Psychiatric overlay, anxiety overlay and depression." And he stated that he would be back at seven o'clock, after dinner.

The Court: This is the testimony of Deputy Marshal Morphy.

Mr. Morphy: These were notes taken from the doctor in my office.

The Court: All right.

Mr. Morphy: Thank you.

The Bailiff: Pardon me, Judge.

The Court: What is it, sir?

(A note was handed to the Court by the Bailiff.)

The Court: This is a statement addressed to me: "I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request."

We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So, I think we will just tell them we got their message and tell them to keep on working.

Are there any further suggestions from anyone?

[fol. 346a] Mr. McLaughlin: Well, we have already moved for a mistrial.

The Court: Tell them I have got their message and I suggest they keep on working.

The Bailiff: All right.

Mr. McLaughlin: Your Honor, I don't know what the technicalities of it are, but if they are going around and if they are going to be kept together, they may as well deliberate on Sunday as not.

The Court: I am in favor of it. I think it is perfectly proper.

Mr. McLaughlin: I don't see what can be gained by keeping them cooped up.

The Court: I will take a verdict on Sunday, and rather to keep them cooped up, they might as well deliberate.

Mr. McLaughlin: As far as that goes, I have already moved that they be discharged. Since that is denied, if they have to work on Sunday, they have to work on Sunday. I don't think there is anything wrong with that.

The Court: In the event of a verdict, would you stipulate it might be received on Sunday?

Mr. McLaughlin: We may as well get it on Sunday as keeping them sitting around waiting for them to hand it in on Monday.

The Court: That is what I mean. I don't see any reason for them sitting around, and I don't think there is any.

That is about all we can accomplish, isn't it, now? That will be all for the time being and we will be in recess awaiting the pleasure of the jury or until further notice.

Mr. McLaughlin: Thank you, your Honor.

The Court: Let the record show the presence of defendant with counsel throughout this proceeding.

(Whereupon, at 3:15 p. m., a recess was taken.)

[fol. 347a] (At 8:20 p. m., Saturday, March 7, 1964, the Court met with counsel in chambers and had an off-the-record discussion, during which it was announced the jury had reached a verdict.)

VERDICT

Saturday, March 7, 1964, 8:20 P. M.

* * * * * * *

The Court: In the case of the United States of America, Plaintiff, versus Anthony M. Grosso, ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Will you please pass it to the bailiff?

(The verdict was handed to the bailiff.)

The Court: The clerk will read the verdict.

The Clerk: Members of the jury empaneled in the case of United States of America, Plaintiff, against Anthony M. Grosso, Defendant, at Criminal No. 62-281, and now; to-wit, March 7, 1964, we the jury empaneled in the above-[fol. 348a] entitled case find the Defendant Anthony M. Grosso is guilty of the charge contained in count 1 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 2 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 3 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 4 of the indictment; and

We find the Defendant Anthony M. Grosso not guilty of the charge contained in count 5 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 6 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 7 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 8 of the indictment.

So say you all.

And we find the Defendant Anthony M. Grosso is guilty of the charge contained in count 9 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 10 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 11 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 12 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 13 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 14 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 15 of the indictment; and [fol. 349a]. We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 16 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 17 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 20 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 21 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 22 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 23 of the indictment.

So say you all.

The Court: Does counsel desire to have the jury polled?

Mr. McLaughlin: Yes, your Honor.

The Clerk: Viola M. Hanam, would you please stand?

Viola M. Hanam, juror No. 1, is the verdict as read your verdict?

Juror No. 1: Yes, it is.

The Clerk: Please be seated.

Juror No. 2, Margie M. Hartdung, would you please stand?

Margie M. Hartdung, is the verdict as read your verdict?

Juror No. 2: It is.

The Clerk: Please be seated.

Juror No. 3, Frances D. McKahan.

Frances D. McKahan, is the verdict as read your verdict?

Juror No. 3: Yes.

The Clerk: Please be seated.

Juror No. 4, King R. Nye.

[fol. 350a] King R. Nye, is the verdict as read your verdict?

Juror No. 4: Yes.

The Clerk: Please be seated.

Juror No. 5, Steve Baker.

Steve Baker, is the verdict as read your verdict?

Juror No. 5: Yes, it is.

The Clerk: Be seated, please.

Juror No. 6, Alberta Barbara Karlosky.

Alberta Barbara Karlosky, is the verdict as read your verdict?

Juror No. 6: Yes, sir.

The Clerk: Please be seated.

Juror No. 7, Alice Marian Eiler.

Alice Marian Eiler, is the verdict as read your verdict?

Juror No. 7: Yes, it is, sir.

The Clerk: Please be seated.

Juror No. 8, James P. Santello.

James P. Santello, is the verdict as read your verdict?

Juror No. 8: Yes.

The Clerk: Please be seated.

Juror No. 9, Benjamin T. Hopkins.

Benjamin T. Hopkins, is the verdict as read your verdict?

Juror No. 9: Yes, sir, it is.

The Clerk: Please be seated.

Juror No. 10, Gerard R. Miller.

Juror No. 10: Yes, it is.

The Clerk: Juror No. 10, Gerard R. Miller, is the verdict as read your verdict?

Juror No. 10: Yes.

The Clerk: Please be seated, sir.

Juror No. 11, Mary Giammaria.

Mary Giammaria, is the verdict as read your verdict?

Juror No. 11: Yes.

[fol. 351a] The Clerk: Please be seated.

Juror No. 12, Ida J. Tempert.

Ida J. Tempert, is the verdict as read your verdict?

Juror No. 12: Yes, sir.

The Clerk: All polled, your Honor.

The Court: Ladies and gentlemen of the jury, the Court thanks each of you. This has been a difficult case, it has been a long trial, over four weeks now. I noticed throughout the trial you were very attentive, and I am sure that your verdict is a result of careful consideration, and I think the Court and the parties are indebted to you for the consideration that you gave this case.

Now you may be excused, and I think you are to be excused from further duty.

The Clerk: Your Honor, their service has been completed. They will return home and their checks will be sent to them, sir.

The Court: Thank you very much.

The Jurors: Thank you.

The Court: The verdict may be recorded now.

The Clerk: Thank you, sir.

(Jury excused.)

(The Court accepted the verdicts of the jury.)

The Court: The Defendant is remanded to the custody of the marshal, and the Court will fix the time for the imposition of sentence. Let's see, today is Saturday. How about Monday afternoon about 2:00 o'clock?

Mr. Diamond: That would be fine, your Honor.

Mr. McLaughlin: I wonder what arrangements, your Honor, we can make, since this is Saturday night, for bail or bond for this gentleman.

The Court: No, he is going to stay in jail. He is remanded to the custody of the marshal.

[fol. 352a] Mr. McLaughlin: Might I say that this is unusual? I feel it is somewhat unwarranted to commit him to jail on Saturday night.

The Court: Well, he is going to jail.

Mr. McLaughlin: He will be held without bail?

The Court: That is the order of the Court.

The judgment and sentence of this Court will be imposed upon the Defendant on Monday, March 9, 1964, at the hour of 2:00 p. m., in this courtroom and sentence will be imposed on all the counts of which he was found guilty by the jury as set forth in the indictment.

Is there anything further the Court should do at this time?

Mr. McLaughlin: There is one thing—go ahead.

Mr. Diamond: We have nothing further, your Honor.

Mr. McLaughlin: The doctor who examined the juror is here, and since he is here, I would like to get a report from him.

The Court: What do you think about it?

I am not going to bring that up here at this time at all. So we will be in recess now until Monday, March 9, 1964, at 2:00 o'clock in the afternoon.

Mr. Diamond: With reference to the companion case, your Honor had indicated that that case was to commence two full days after the termination of this case. Counsel for the Defendant is here in court, and he has requested that the case be postponed for a week. We would concur in that request for several reasons, and if your Honor will give us that time—

The Court: You will have to get another judge, because I don't want to stay around another week. If you want to try the case in three days, I will try it.

Mr. Diamond: Would Wednesday morning be all right?

The Court: To start the trial?

[fol. 353a] Mr. Diamond: Yes, your Honor.

The Court: All right, to start the trial. Do you have the title of the case? The clerk knows what it is.

Mr. McLaughlin: I am not counsel in it, your Honor.

Mr. Wadden: I am, your Honor.

The Court: Mr. Wadden, yes. We will start, then, Wednesday. Is that three days after today? I guess it is, isn't it?

Mr. Diamond: Yes, your Honor.

The Court: We will start the trial in that case at 10:00 o'clock Wednesday morning with the jury here.

Mr. Diamond: Thank you, your Honor.

The Court: The Defendant is remanded to the custody of the marshal.

(Whereupon, at 9:07 p. m., Saturday, March 7, 1964, court was recessed.)

Certified: A true transcript.

Jack M. LaMotte, Official Reporter.

PROCEEDINGS OF MARCH 10, 1964

ARGUMENTS ON MOTIONS

The Court: Let the record show the presence of the defendant with counsel. I understand you have some motions.

Mr. McLaughlin: He is on his way down, your Honor. The defendant is—

The Court: Oh, I thought he was here.

[fol. 354a] Mr. McLaughlin: He is on his way down.

The Court: Oh, pardon me.

(The defendant was brought into the courtroom.)

Mr. McLaughlin: The defendant is present now, your Honor, and I will proceed.

The Court: Let the record show the presence of the defendant. Is he here?

Mr. McLaughlin: Yes, sir.

The Court: Let the record show the presence of the defendant with counsel. You may proceed, sir.

Mr. McLaughlin: Thank you. I have several motions, your Honor. Before I proceed to them, there are two things I would like to inquire of so that the record is clear.

It is my understanding from listening to the sentence yesterday that the sentence was passed without a pre-sentence report. In other words, the pre-sentence investigation.

The Court: I didn't ask for one.

Mr. McLaughlin: I just wondered about that.

The Court: I heard that during the trial.

Mr. McLaughlin: And, secondly, it was my understanding yesterday when I made my motion for bail that your Honor did not care to have a hearing on it.

The Court: I denied bail, yes.

Mr. McLaughlin: That is right. I just wanted to make that clear.

The Court: Yes.

Mr. McLaughlin: Now, I have two motions here today, your Honor. In accordance with the rules, I had made a motion for judgment of acquittal at the close of the Government's evidence, and it was denied. I had made a motion—

The Court: I couldn't hear what you said. You made [fol. 355a] a motion for acquittal at the close of the government's evidence?

Mr. McLaughlin: Yes, and it was denied.

The Court: This motion has been denied?

Mr. McLaughlin: That is right.

The Court: Yes.

Mr. McLaughlin: And, I don't like to beat a dead horse or take the time of the Court on something that we have already argued. This would be the third time. And, it is identical in every respect to the motion that we argued once for two days and once for the greater part of an afternoon.

The Court: Yes. That is this motion.

Mr. McLaughlin: The motion for judgment of acquittal.

The Court: And this was filed today, March 10, 1964. It is the same motion in substance?

Mr. McLaughlin: It is identical to the one that we argued twice before. So, I don't see any point in taking the time of the Court to re-argue something that we argued twice before. I am filing it in accordance with the rules because, after—

The Court: You don't propose to argue it any further. I wonder if counsel for the government wants to have anything to say about it?

Mr. Diamond: No, your Honor.

Mr. McLaughlin: I think I said everything about it.

The Court: All right. The same ruling. The motion for judgment of acquittal at the close of the evidence filed March 10, 1964 is denied in all respects.

Mr. McLaughlin: I think, if I am not mistaken, there is probably a mistake in the caption of that motion. It shouldn't read "At the close of the government's evidence". It is identical to that motion. It should read "At the close [fol. 356a] of the case". I will correct it on the original on your Honor's copy.

The Court: "At the close of all of the evidence"?

Mr. McLaughlin: "At the close of all of the evidence", it should be.

The Court: So, that may be corrected by interlineation.

Mr. McLaughlin: Yes, your Honor.

The Court: How do you want it corrected? It would be a motion for judgment of acquittal—

Mr. McLaughlin: "After verdict".

The Court: "After verdict." Yes. That will do it.

(The corrections were made on the papers.)

Mr. McLaughlin: That will set that straight.

The Court: All right. And, that has been denied. The motion for judgment of acquittal after verdict has been denied.

* * * * * * *

[fol. 364a] Mr. McLaughlin: * * * The only other matters that have not been raised—or actually I think they have been raised—is the matter, and I am sure your Honor is [fol. 365a] aware, that once this juror got ill, I made several motions for a mistrial on the basis that—

The Court: There is one thing I noticed from looking over this. You made a point that there was a communication received of which you were not informed and of which the defendant was not informed. There was a communication which stated that the jury could not agree. That is all they said, and that is obvious. If they could agree, they would have been in court. Any time a jury is out, they haven't agreed.

Mr. McLaughlin: I was going to get to that.

The Court: So, if that wasn't shown to you, it was just a mere oversight. I have had another one later on. I had two. One was almost identical or to the same effect, that they couldn't agree.

Mr. McLaughlin: I was present when the second one came in.

The Court: But, the other one was at least in substance the same. If it wasn't given to you, it was merely inadvertence. But, it would only inform you what you already knew, that the jury had not agreed.

Mr. McLaughlin: I guess both the communications, I suppose that the clerk had those now, I guess.

The Court: I don't know whether he has them.

Mr. McLaughlin: The second one, as I recall, you read into the record.

The Court: I don't remember. But, I know what it said, that they couldn't agree. That is all.

Mr. McLaughlin: You are aware, of course, that I made several motions for mistrial at that point, after the juror had become ill, on the basis that the jury already having given notice that they couldn't agree, and then giving a second notice that it couldn't agree, and with the informa-[fol. 366a] tion received from the doctor that one of the jurors was suffering from nervous prostration and was in a

state of mental depression, that in our view the requirement that the jury stay together, and keeping the jury together until Saturday night, actually constituted coercing the jury into bringing forth some kind of a verdict.

And, it is our view of it that the verdict that was brought forth was from a jury which was composed of one person who was mentally and physically incompetent to serve as a juror.

The Court: It is a strange thing—it seems odd—I don't know what it means, and I didn't mean to imply anything at all. We had four alternates sitting here during the whole trial, for four weeks, and everybody was healthy. Nothing wrong with their nerves until those alternates were all dismissed.

Mr. McLaughlin: Well, we wouldn't have had any problems if somebody had gotten sick the day before.

The Court: No. They were perfectly healthy and showed no signs of any nervous depression or any other ailment until the alternates were gone.

Mr. McLaughlin: Well, the doctor indicated, I believe, that some people just can't stand tension. And, apparently, there must have been some split in opinion at some time, because they were out for quite a while. And, apparently, there was some tension.

The Court: Well, don't you think that on any jury there might be a minority. Of course, there must be a minority if they can't agree, either one to eleven or six to six, some for conviction and some for acquittal. It might get down to where there is only one or two, either standing out against an acquittal or standing out against conviction. And, of course, they listen to the arguments and arguments [fol. 367a] and arguments, and I suppose they get a little bit angry at times too.

Mr. McLaughlin: I would imagine so. I have never been on a jury.

The Court: Well, I have heard people talk about them.

Mr. McLaughlin: Yes, I have too.

The Court: They have some angry times. They get put out at one another. And, finally, they apologize to one another and make up, and then sit down and come to a verdict. So, that is nothing unusual. And, a person is bound, after a trial of five weeks nearly, and sitting in there, if she was one of a minority or the only one of a minority—I don't know which it was—but if she was, there must have been some argument and discussion. And, it could be wearing and tearing of her nerves. That is natural.

Mr. McLaughlin: Well, it is our contention that in view of the doctor's report, if it was wearing and tearing it was tearing to the extent that the woman had to be confined to bed from Thursday evening at, I think, maybe 11 o'clock or something like that, or 11:30, through Saturday until around noon.

The Court: Well, I think everything that could have been done was done by the marshals and those in charge of the jury, the deputy marshals. The doctor seemed to be very attentive and efficient as far as I know. She had an opportunity for rest. There was nothing to show here that when she returned to the jury room she did so under any protest that she wouldn't be able to proceed. The doctor thought she could go ahead. And, I would think she thought so too or she would have told the marshals to that effect. I don't think anybody would compel a person to get out of a sick bed and go down into a room and deliberate over something of this nature, or of any nature.

[fol. 368a] Mr. McLaughlin: Well, it is indicated by the record, your Honor, I think Mr. Morphy told us that when they came back on Saturday, he asked her how she was, and she could walk under her own power, but she said she was weak.

The Court: Sure. She would be weak.

Mr. McLaughlin: And, it is our contention that such a person—of course, when the jury is confined like that—

The Court: Well, that certainly isn't enough to cause me to sustain a motion for a new trial. And, I wouldn't sustain

a motion for a new trial for the fact that Juror No. 5 might be a constable.

Mr. McLaughlin: There is no question that he is a constable.

The Court: I don't know. I don't dispute you.

Mr. McLaughlin: We have checked it.

The Court: I will say that you are honestly stating that you think he was, anyway. It is not a question of your integrity.

Mr. McLaughlin: Actually, I believe, your Honor, you will find that most of the other motions or reasons suggested in the new trial motion all deal with points of evidence that we argued during the trial. And, as I said, I don't see any necessity for taking up all the time in rearguing something that we argued for five full weeks.

The Court: I would like to hear from counsel for the Government as to their views as to whether or not—I assume the counsel for Government have studied and looked over the motions. And, if they have any idea that it is very likely that a new trial should be ordered, I would like to know something about it.

Mr. Diamond: This was handed to me at five minutes till two o'clock—

[fol. 369a] The Court: I would rather find out now rather than find out later on from the Court of Appeals. If we have got some fatal weakness in here, I would appreciate knowing it now.

Mr. Diamond: This motion was handed to me at five minutes to two, and I have hastily looked over it. I see no basis in this motion that would support the granting of a new trial.

As Mr. McLaughlin has indicated, most of what is contained in here has already been argued except for these matters which occurred subsequent to the retiring of the jury for deliberation.

The Court: I can't think of anything myself that would cause me to worry about that. I don't know. I don't see it.

So, are you through?

Mr. McLaughlin: Yes, sir.

The Court: The motion for a new trial is denied in all respects. Is there any other matters to come before the Court now?

Mr. McLaughlin: I don't think so.

Mr. Diamond: We have nothing further, your Honor.

The Court: So, the defendant is remanded to the custody of the Marshal for carrying out the judgment of the Court.

Mr. McLaughlin: I wonder if—of course, these orders all go in the record, but I wonder if I could have a written order denying bail?

The Court: It is in the record that it is denied. I won't grant it.

Mr. McLaughlin: Well, that is what I mean. I wonder if I could—

The Court: It is a matter that the Court of Appeals [fol. 370a] might take a more favorable view of than I do. But, I won't grant bail.

Mr. McLaughlin: Well, that is what I mean. I wonder if—

The Court: Under the circumstances shown in this case, no.

Mr. McLaughlin: I wonder if I could get an order to that effect?

The Court: No. It is in the record. If there is a motion to grant bail, it is denied. And, all the motions now pending have been decided.

Mr. McLaughlin: That is right.

The Court: The motion for a new trial is denied and the motion for acquittal filed March 10, 1964 is denied in all respects, and all the grounds urged are rejected. The motion for a new trial filed March 10, 1964 is denied in all respects and all the grounds urged are rejected by the Court.

So, the defendant is remanded to the custody of the Marshal for carrying out the judgment of the Court. If

there is nothing further to come before the Court, Court will be in recess until tomorrow morning at 10:00 o'clock.

(Whereupon the Court recessed.)

Certified:

A True Transcript:

B. D. Cook, Official Reporter.

CARL—ENDS 6

[fol. 371a]

IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT OF ACQUITTAL AFTER VERDICT—
Filed March 10, 1964

And Now comes the defendant, Anthony M. Grosso, by his Attorney, James E. McLaughlin, Esquire, and renews his Motions for Judgment of Acquittal as to all counts of the Indictment previously filed at the close of the Government's case and at the close of all the evidence, for the reason that such evidence is insufficient as a matter of law to sustain a conviction. Specific grounds which relate to the respective counts are set forth hereinafter.

The grounds which relate to Count One of the Indictment are as follows:

1. The Government has failed to prove there is a tax liability due and owing and thus has failed to prove the essential intent to defraud.
2. The inadmissibility of Government Exhibit One renders the evidence on this Count insufficient.
3. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401.
4. The Government has failed to prove defendant could have paid the excise tax without risk of self-incrimination in violation of his Fifth Amendment rights.

5. The Government has failed to prove the conspiracy alleged in Count One in that it has failed to prove the purpose of the alleged conspiracy was to defraud the United States; and in that its proof tends to show multiple conspiracies rather than the single conspiracy alleged.

[fol. 372a] The grounds which relate to Count Two of the Indictment are as follows:

1. The Government has offered no proof of excise tax liability for this period covered by this Count.
2. The Government has failed to prove that there is a tax liability due and owing by the defendant on this Count, because it has not shown whether the excise tax was paid by the writers or branch managers.
3. The Government has failed to prove the alleged excise tax liability has not been paid by the defendant's alleged partners.
4. The inadmissibility of Government's Exhibit One renders the evidence on this Count insufficient.
5. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401.
6. The Government has failed to prove defendant could have paid the excise tax without risk of self-incrimination in violation of his Fifth Amendment rights.
7. The Government's proof shows a different partnership from that alleged in the Indictment.

The grounds which relate to Counts Three through Fifteen are the same as the grounds specified with respect to Count Two, with the exception of the ground set forth in Paragraph One of such grounds.

The grounds which relate to Counts Sixteen through Eighteen are the same as the grounds specified with respect to Count Two.

The grounds which relate to Count Twenty of the Indictment are as follows:

[fol. 373a] 1. The Government has failed to offer proof of any amount of excise tax liability for the month to which this Count relates, and accordingly, has failed to establish the occupational tax liability alleged in this Count.

2. The inadmissibility of Government's Exhibit One renders the evidence on this Count insufficient.

3. The Government's own proof establishes that one or more of defendant's alleged partners had an occupational tax stamp during the period covered by this Count, and thus negates defendant's liability for the occupational stamp alleged in this Count.

4. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401, and thus has been erroneously charged under Sec. 4411.

Counts Twenty-One and Twenty-Two of the Indictment are the same as the grounds specified with respect to Count Twenty, with the exception of the grounds set forth in Paragraph One of such counts.

The counts which relate to Count Twenty-Three of the Indictment are the same as the grounds specified with respect to Count Twenty.

James E. McLaughlin, Esquire, Atty. for Deft.—
Anthony M. Grosso.

Submitted: March 10, 1964.

[fol. 374a]

IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed March 10, 1964

Comes Now the defendant, by his attorney, James E. McLaughlin, and moves, pursuant to Rules 29(b) and 33 of the Federal Rules of Criminal Procedure, that in the event his motion for judgment of acquittal be denied as to any count or counts, a new trial be granted as to such count or counts.

The grounds for this motion in the alternative for a new trial are as follows (unless otherwise indicated, each ground applies to each count on which defendant was found guilty, namely, counts 1 through 4, 6 through 17, and 20 through 23).

1. All grounds asserted in the motions for judgment of acquittal made or renewed at the close of the government's case, at the close of all the evidence, and after discharge of the jury.

2. The court erred in denying defendant's motions for judgment of acquittal made or renewed at the close of the government's case, at the close of all the evidence and after discharge of the jury.

3. The verdict is contrary to the weight of the evidence.

4. The verdict is not supported by substantial evidence.

5. The court erred in charging the jury and in refusing to charge the jury as requested.

6. The verdict of not guilty on count 5 establishes that the jury found this defendant entitled to credit for excise tax paid by the co-defendant and alleged co-partner, Joseph Pino, during March of 1959. The undisputed evi-
[fol. 375a] dence introduced by the government established that the amount of such excise tax payment by Pino was $25,000.00. The excess of this payment over the amount proven to be due and owing for the period covered by

count 5 should have been credited against the tax liability found due and owing for the periods covered by other counts. The verdict of guilty on all other counts demonstrates that such credit was not given.

7. The verdict of guilty on each of counts 20, 21, 22 and 23 is inconsistent with the verdict of guilty on the excise tax counts (counts 2 through 4 and 6 through 17). The verdict on the excise tax counts shows that the jury found the existence of a partnership, as alleged; but such partnership was required to pay only one special wagering occupational tax, under 26 U. S. C. § 4902. Since the government's undisputed evidence showed the payment of wagering occupational tax by this defendant's alleged partners, this defendant was not liable for the tax as charged.

8. The court erred in denying defendant's motion for mistrial on March 6, 1964. A supporting affidavit of James E. McLaughlin shows factual bases for this ground on the motion, supplementing those which already appear upon the record.

9. The court erred in denying defendant's motions for mistrial on March 7, 1964. A supporting affidavit of James E. McLaughlin shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

10. The court erred in requiring the jury to continue deliberations from the afternoon of March 4 until the night of March 7, notwithstanding the jury's having twice re-
[fol. 376a] ported a hopeless deadlock, and notwithstanding that two of the jurors became ill and at least one of them was in a physical and mental condition where she could not properly discharge the functions of a juror. A supporting affidavit of James E. McLaughlin shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

11. Irregularities and improprieties occurred between the time of the jury's retiring to consider its verdict on

March 4 and the rendition of its verdict on March 7. A supporting affidavit of James E. McLaughlin shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

12. None of the proceedings on March 5 was recorded by the court reporter, as required by law. Certain of the proceedings on March 4 (subsequent to the jury's retiring to consider its verdict), March 6 and March 7, were also not recorded by the court reporter, as required by law. A supporting affidavit of James E. McLaughlin shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

13. Certain of the proceedings between March 4 and March 7 were held in the absence of defendant and his counsel, who were lawfully entitled to be present. A supporting affidavit of James E. McLaughlin shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

14. The court erred in refusing to take testimony, on the night of March 7, from the doctor who had examined and treated one of the jurors on March 5, March 6, and March 7. A supporting affidavit of James E. McLaughlin [fol. 377a] shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

15. One of the jurors, Steve Baker, was and is a law enforcement officer of the State of Pennsylvania, namely a constable in Belle Vernon, Pa. This fact was concealed from defendant and his counsel by Mr. Baker's statement as to his occupation and employment on the *voir dire* (February 3 transcript of proceedings, p. 56). Had Mr. Baker's status as a constable been revealed, defendant would have had a basis to challenge Mr. Baker for cause; had such challenge for cause been denied, defendant would have exercised a peremptory challenge to exclude Mr. Baker from the jury. A supporting affidavit of Frederick

G. Koerner shows the factual basis for this ground on the motion.

16. On the night of March 9, 1964, Cresson Davis, Chief of Intelligence for the Internal Revenue Service in this district, publicly stated on a television broadcast that a purpose and effect of the wagering tax laws under which defendant was convicted and sentenced was to tip off local law enforcement authorities as to unlawful gambling activities. This statement of Mr. Davis is in conflict with the position represented to the court by the government and by witnesses from the Internal Revenue Service. It constitutes newly discovered evidence, not previously available to the defense, showing that compliance with the wagering excise tax statutes may not be compelled without infringement of Fifth Amendment guarantees.

17. The Court erred in granting the government's motion to reopen its case after the defendant's motion for judgment of acquittal at the close of the government's case [fol. 378a] and the argument thereon had demonstrated the failure to prove an essential element of its case.

18. The court erred in denying defendant's motion for mistrial on the basis of prejudicial newspaper material.

19. The Court erred in denying defendant's motion for mistrial on the basis of the erroneous admission of witness Flynn's testimony as to an alleged prior statement by the witness Sunner, which had not been testified to by the witness Sunner, and was highly prejudicial.

20. The court erred in sending the court's instructions to the jury, over defendant's objections.

21. The court erred in sustaining objections to and excluding the testimony and proffered testimony of defendant's expert witness, John Dwyer.

22. The court erred in ruling that the defense was not entitled to a hearing, outside the presence of the jury, at

which it might seek to demonstrate that the witness Hamilton had been utilized by some agent or agents of the government to obtain information pertinent to the defense, to interfere with defendant's Sixth Amendment right to assistance of counsel, and at the behest of a government agent or agents to communicate directly with the defendant although the government knew that such defendant was under indictment and represented by counsel.

23. The court erred in admitting government's exhibits 76 and 77 (notebooks seized at the so-called Bethel Park raid) and other fruits of the unlawful search and seizure at the Betz premises in Bethel Park on March 25, 1961, which were the subject of Paragraph 25 of the defendants' [fol. 379a] motion for suppression and return of evidence, and which the government had represented to the court and to defense counsel that it would not introduce in evidence.

24. The court erred in admitting government's exhibit 1 (the record book kept by Harold Hannon) and other fruits of the unlawful search and seizure of the Hannon premises on April 27, 1960. The search and seizure was the subject of Paragraph 21 of defendants' pre-trial motion for suppression and return of evidence, and of renewed motions to suppress at trial on the basis of the augmented record available, showing that the search and seizure were in violation of 18 U. S. C. § 3109, and of the Fourth Amendment of the United States Constitution.

25. The court erred in admitting government's exhibits 8, 9 and 10 (the two notebooks and a package of papers seized at Oakland) and other fruits of the unlawful search and seizure at Oakland on April 20, 1959, which were the subject of Paragraph 10 of defendants' motion for suppression and return of evidence.

26. The court erred in admitting government's exhibit 11 (box of numbers slips seized at Calvary Cemetery) and other fruits of the unlawful search and seizure at Calvary

Cemetery on November 27, 1959, which were the subject of Paragraph 15 of defendants' motion for suppression and return of evidence.

27. The court erred in admitting government's exhibit 50.

28. The Court erred in admitting government's exhibit 52.

29. The court erred in admitting government's exhibit 54.

[fol. 380a] 30. The court erred in failing to permit defense counsel to examine all of the grand jury testimony of the witness Sunner.

31. The court erred in charging the jury in Instruction No. 31 and No. 32.

32. The court erred in failing to charge the jury as reflected by defendant's refused instructions filed of record.

33. The court erred in accepting a communication from the jury on March 5, 1964 in the absence of the defendant or his counsel and in replying thereto without informing defendant's counsel of the exact context of the message or making same a part of the record.

34. The court erred in permitting an unsupervised separation of the jury after they had begun their deliberations.

35. The court erred in ordering the jury to be confined from 11:30 P. M., March 5, 1964 until approximately 2:30 P. M., March 7, 1964 when it knew or should have known that one of the jurors was suffering from nervous prostration, mental depression and was in such poor health as to render the juror unfit for jury service and deliberation.

36. The court erred in permitting the jury to reach a verdict before securing a medical opinion as to the fitness of the juror who was ill.

37. The court erred in refusing the jury's request for discharge because of their hopeless deadlock on Saturday, March 7, 1964, at approximately 3:10 P. M. in view of the reports relative to the physical condition of one of the jurors.

[fol. 381a] 38. The court erred in failing to make a record of the treatment and diagnosis of the court appointed physician who attended the sick juror.

39. *In support of this motion*, defendant hereby reasserts all objections and motions made at trial and during the pre-trial proceedings upon which the court ruled adversely to defendant.

Respectfully submitted,

James E. McLaughlin, Esquire, Atty. of Deft.—Anthony M. Grosso.

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

Before me the undersigned authority appeared James E. McLaughlin, Esquire, who being duly sworn, deposes and says:

The issues in this case were submitted to the jury on Wednesday, March 4, 1964 at approximately 4:15 P. M. Deliberation continued that day until approximately 11:00 P. M. at which time the jury was taken to a hotel.

Thursday, March 5, 1964 the jury resumed deliberation. At approximately 12:15 P. M. Thursday afternoon, counsel for the defendant was informed by the U. S. Attorney that at approximately 11:30 A. M. the jury had sent a note to the judge indicating they could not agree. The U. S. Attorney further informed defense counsel that the court had, at that point instructed the jury, through the bailiff to continue deliberating. Neither the defendant nor his attorney were present when this communication was received by the court, nor were they when the court made

[fol. 382a] its reply to the jury. This communication from the jury was never made a part of the record.

At 10:50 P. M. Thursday, March 5, 1964 the attorney for the defendant was notified by the U. S. Attorney that a juror had been taken ill as she was being escorted from the building and required medical attention which was then being sought. The U. S. Attorney then suggested that defense counsel contact the trial judge at his hotel, which was immediately done. Upon contacting the court, I informed the court I would not oppose necessary medical attention for the sick juror and indeed, felt that I could not morally or ethically permit her to go without necessary medical attention. Within ten minutes the trial judge again contacted me and informed me that a second juror had become ill. I immediately left for the courthouse and arrived within ten minutes. Upon arrival, I was informed by the U. S. Attorney that a doctor had been procured by one William Claney Smith, Assistant District Attorney of Allegheny County after a number of unsuccessful attempts on the part of Federal personnel.

The doctor arrived sometime after 11:30 P. M. that night and examined the two sick jurors, both of whom were women. The record discloses that during the period of initial illness and medical examination these two women jurors were separated from the rest of the jury for a period of forty-five minutes to one hour. At the conclusion of the examination, the doctor gave a report by telephone to the trial judge in the presence of the U. S. Attorney and myself. The gist of the report was that one juror felt better and the second juror was suffering from nervous disorder which would probably be improved by rest.

[fol. 383a] *Friday, March 6, 1964:*

At approximately 10:30 A. M. the court received a report from the doctor which was relayed to counsel in their presence. The report indicated that the sick juror was suffering from neuro-circulatory-asthenia. Subsequent to some discussion which was not recorded in the record, de-

fense counsel moved for a mistrial at approximately 11:45 A. M. The proceeding in the latter respect are a part of the record. The jury did not deliberate at all on this day and were kept confined to their hotel.

Saturday, March 7, 1964:

On Saturday morning at approximately 11:30 A. M. all counsel conferred with this court, which conference was not put on the record. At this conference defense counsel was informed by the court that the woman juror who was ill was still unable to resume deliberation, but that the jury would be brought back for deliberation at approximately 2:00 P. M. The jury returned at approximately 2:50 P. M., whereupon counsel for defendant and the Government had a conference which was made a part of the record.

The jury continued to deliberate without being taken out for dinner (box-lunches were sent in to them) until approximately 8:30 P. M. when they arrived at a verdict. Prior to the jury signifying a verdict, counsel and the court met at 8:20 P. M. for a conference which was not made a part of the record. At this conference the Government again indicated its desire to have the court give the "Allen" charge. Counsel for defendant objected until the court's physician completed his examination of the ill juror and until the results of such examination were made a part of [fol. 384a] the record. The court agreed and while waiting for the arrival of the doctor the verdict came in and was accepted by the court. The physician examined the juror after the guilty verdict was rendered, the jury polled and the jury was discharged. After the court had entered judgment and while the doctor was still available the record discloses that counsel for defendant requested the opportunity to secure a report from him, this request was denied by the court.

The jurors were confined to their quarters from late in the evening March 5, 1964 to approximately 2:45 P. M.

March 7, 1964 because of the illness of a juror. During that period the only detailed report of the juror's condition which was made a part of the record was a report placed on the record by defense counsel after consultation with the court, on Government appointed physician. Counsel for defendant was informed that the juror was medicated by the physician, but the extent and type of medication are presently unknown.

The statements made by the deponent in chambers reported in the transcript of proceedings held in the judge's chambers on March 6 and 7, 1964 are hereby adopted and made a part of this affidavit.

James E. McLaughlin

Sworn to and subscribed before me this ..... day of ....., 1964.

....., Notary Public.

[fol. 385a]

IN UNITED STATES DISTRICT COURT

ORDER OF COURT—Filed March 11, 1964

Counsel for defendant filed a Motion for New Trial on March 10 which Motion made reference to a supporting affidavit of counsel which had not yet been filed. The supporting affidavit was submitted to the court on March 11, 1964, and it is hereby Ordered that it be filed and made a part of the record on the Motion for New Trial. The submission and consideration of the affidavit in no way alters the decision of the Court that the Motion for New Trial should be and is denied in all respects.

Rodger T. Foley, District Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 10, 1964

Name and address of appellant:

Anthony M. Grosso, 840 Ridgeview Drive, Pgh. Pa.

Name and address of appellant's attorney:

James E. McLaughlin, Esquire, 606 Frick Bldg., Pittsburgh, Pennsylvania.

Offense:

18 U. S. C. § 371 (count 1); 26 U. S. C. § 4401 and 7203 (counts 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17); 26 U. S. C. § 4411 and 7203 (counts 20, 21, 22, 23).

[fol. 386a] Concise statement of judgment or order, giving date, and any sentence:

Judgment of conviction entered March 9, 1964, upon counts 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23 of indictment No. 62-281.

Sentence: on count 1, one year's imprisonment and $1000.00 fine. On each of the remaining counts, one year's imprisonment and $10,000.00 fine. The terms of imprisonment on counts 4, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17 are to run concurrently with the term of imprisonment imposed for violation of count 2. The terms of imprisonment on counts 1, 2, 3, 7, 14, 20, 21, 22, 23 are consecutive.

The appeal is also from the order of March 10, 1964, denying defendant's motions for acquittal or new trial.

Name of institution where now confined, if not on bail:
Allegheny County Jail.

The above-named appellant hereby appeals to the United States Court of Appeals for the Third Circuit from the above-stated judgment.

Dated: March 10, 1964.

James E. McLaughlin, Esq., Attorney for Appellant,
606 Frick Bldg., Pittsburgh, Pa.

[fol. 387]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14810

UNITED STATES OF AMERICA,

v.

ANTHONY M. GROSSO, Appellant.

Appeal from the Order of the United States Court for the Western District of Pennsylvania at No. 62-281 Criminal.

APPELLEE'S APPENDIX—Filed March 11, 1965

* * * * * * *

[fol. 388] Excerpts From Transcript of Testimony

* * * * * * *

[fol. 389] MR. W. DEAN STRUBLE, called as a witness by the Government, being first duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Reich:

Q. Mr. Struble, would you state your name and your occupation?

A. W. Dean Struble, technical advisor to the District Director of Internal Revenue, Pittsburgh, Pennsylvania.

Q. How long have you been employed by the Internal Revenue Service?

A. Over twenty-three years.

Q. And, what are the nature of your duties?

A. The investigation, assessment and collection of delinquent federal taxes.

[fol. 390] Q. And are you here today as a representative of the District Director of Internal Revenue for this District?

A. I am, sir.

Q. And does the District Director of Internal Revenue for this District have custody of Internal Revenue records which pertain to the payment of taxes in this District?

A. Yes, sir, we have.

Q. What is the geographical area covered by this Internal Revenue District?

A. The western half of the State of Pennsylvania.

Q. And does that include Allegheny County?

A. Yes, sir.

Q. Would you explain to the jury what is a Form 11-C?

A. A Form 11-C serves two purposes. The first is an application for registry for a wagering tax stamp. After the application is properly filed and the tax paid, at that time the Form 11-C becomes a special tax return. So it has two purposes.

Q. And what tax does it pertain to?

A. It pertains to the wagering tax.

Q. Is that what is popularly known as the gambler's stamp?

A. Yes, sir.

Q. And how much tax payment is required for obtaining the gambling stamp?

A. If it is for a full fiscal year, it is $50.

Q. And you mentioned "fiscal year." What is the period of time covered by the stamp?

A. It is the same as the federal government's fiscal year, July 1st of one year until June 30 of the following year.

[fol. 391] Q. Now, Mr. Struble, does any part of the 11-C become available to the general public?

A. No, sir.

The Court: I didn't catch that. Will you read that.

(The last question and answer were read.)

By Mr. Reich:

Q. Is there any procedure by which any of the information on the 11-C becomes available to the general public?

A. Well, at the time the Form 11-C is accepted by the Director's Office, a wagering tax stamp is prepared. It is a five-part snap out assembly, attached on the left-hand side.

And the entire assembly is placed in the typewriter and the name and address that would have appeared on the application form is then typed right onto the stamp, and the stamp itself would then be given to the individual that made the application.

The second copy of that five-part assembly is known as a record-10 and that is the record that is kept in the District Director's Office in an alphabetical file and is a public record. It is maintained there on a fiscal year basis and each fiscal year is kept separately.

Q. And when you say it is a public record, does that mean that any member of the public can gain access to the information on the Record-10?

A. Yes, sir.

Q. Any policeman?

A. Anyone.

[fol. 392] Q. Anyone?

A. Yes, anyone.

The Court: What was that called?

Mr. Reich: A record-10, your Honor.

The Court: A record-10?

The Witness: I might add, sir, that this assembly is so made that in the upper right-hand corner it has a stamp number. And that is the only number of that stamp.

In other words, it is the same as your license number. No one in Pennsylvania has the same license number as you have.

By Mr. Reich:

Q. And no one would have the same stamp number as you have?

A. That is right, sir. And the record-10 form behind, when it is manufactured, has the same number in the upper right-hand corner that appears on the stamp, which is the first part.

Q. Now, Mr. Struble, would you explain to the jury now what is a Form 730?

A. A Form 730 is a treasury form, Internal Revenue Service form, that is used for the purpose of filing and paying the excise tax that is due on wagers. That is ten per cent of the gross wagers for a particular month.

Q. And, when must the 730 be filed?

A. The form must be filed for a particular month by the end of the following month.

Q. So if I accepted $100 worth of wagers in January, by the last day of February I would be required to file a form 730 declaring that $100 and paying the $10 tax?

[fol. 393] A. If you were the principal, that is right, sir.

Q. And is the Form 730 available to the general public?

A. No, it is not.

Q. This is a confidential record?

A. Yes, sir.

Q. Now, if a person is operating a lottery in Allegheny County, Mr. Struble, under the procedures of the Internal Revenue Service would he be required to file his 11-C and his 730 with your office?

A. Yes, sir.

Q. Would you tell us, Mr. Struble, whether the information on the 11-C is used in any way in connection with the computation and collection of the ten per cent excise tax?

A. Well, the 11-C when filed would indicate the beginning period. And, at the time the application is filed, there are questions on the application as to whether the individual is a principal.

If he is a principal, he must answer who his agents are. And, if he is an agent, he must give the name of the principal that he is working for.

And, as a result of the application being properly filed, in addition to the name being put on the stamp, there is another number put on there, a "P" and whatever the next number would be. And, the third copy of the stamp assembly is a mailing slip. So that, the name and this number with a "P" before it would appear on this slip.

And that is the record from which, if it has a "P" on there, that our office would then see that each month he [fol. 394] sent a Form 730, because those that are principals are required to file the Form 730.

So that, that party would automatically receive a Form 730 with his name embossed right on the Form 730 so that it could be used for that particular month.

Q. Now, on the Form 11-C, is the taxpayer also required to give his business address and the names of any partners he might have?

A. Yes, sir.

The Court: May I ask a question. He said something about a principal a moment ago, didn't he?

Mr. Reich: Yes, he did, your Honor.

The Court: Shouldn't that be explained?

Mr. Reich: Yes, I am going to explain it. I am going to have it explained.

The Court: All right.

By Mr. Reich:

Q. Now, you have indicated that if a person indicates on his tax return that he is a principal, his stamp is marked with a "P"?

A. Yes, sir.

Q. Now, is the taxpayer asked on the form 11-C whether he is accepting wagers on his own account or on account of another?

A. Yes, sir. That is part of the application.

Q. And he is required to say whether he is a principal or an agent?

A. That is right.

A. That is right, sir. And the record-10 form behind, when it is manufactured, has the same number in the upper right-hand corner that appears on the stamp, which is the first part.

Q. Now, Mr. Struble, would you explain to the jury now what is a Form 730?

A. A Form 730 is a treasury form, Internal Revenue Service form, that is used for the purpose of filing and paying the excise tax that is due on wagers. That is ten per cent of the gross wagers for a particular month.

Q. And, when must the 730 be filed?

A. The form must be filed for a particular month by the end of the following month.

Q. So if I accepted $100 worth of wagers in January, by the last day of February I would be required to file a form 730 declaring that $100 and paying the $10 tax?

[fol. 393] A. If you were the principal, that is right, sir.

Q. And is the Form 730 available to the general public?

A. No, it is not.

Q. This is a confidential record?

A. Yes, sir.

Q. Now, if a person is operating a lottery in Allegheny County, Mr. Struble, under the procedures of the Internal Revenue Service would he be required to file his 11-C and his 730 with your office?

A. Yes, sir.

Q. Would you tell us, Mr. Struble, whether the information on the 11-C is used in any way in connection with the computation and collection of the ten per cent excise tax?

A. Well, the 11-C when filed would indicate the beginning period. And, at the time the application is filed, there are questions on the application as to whether the individual is a principal.

If he is a principal, he must answer who his agents are. And, if he is an agent, he must give the name of the principal that he is working for.

And, as a result of the application being properly filed, in addition to the name being put on the stamp, there is another number put on there, a "P" and whatever the next number would be. And, the third copy of the stamp assembly is a mailing slip. So that, the name and this number with a "P" before it would appear on this slip.

And that is the record from which, if it has a "P" on there, that our office would then see that each month he [fol. 394] sent a Form 730, because those that are principals are required to file the Form 730.

So that, that party would automatically receive a Form 730 with his name embossed right on the Form 730 so that it could be used for that particular month.

Q. Now, on the Form 11-C, is the taxpayer also required to give his business address and the names of any partners he might have?

A. Yes, sir.

The Court: May I ask a question. He said something about a principal a moment ago, didn't he?

Mr. Reich: Yes, he did, your Honor.

The Court: Shouldn't that be explained?

Mr. Reich: Yes, I am going to explain it. I am going to have it explained.

The Court: All right.

By Mr. Reich:

Q. Now, you have indicated that if a person indicates on his tax return that he is a principal, his stamp is marked with a "P"?

A. Yes, sir.

Q. Now, is the taxpayer asked on the form 11-C whether he is accepting wagers on his own account or on account of another?

A. Yes, sir. That is part of the application.

Q. And he is required to say whether he is a principal or an agent?

A. That is right.

Q. And what happens if he indicates that he is an agent?
[fol. 395] A. If he indicates that he is an agent, he is also to indicate who his principal is.

Q. And if he indicates that he is a principal, this "P" goes on his 11-C?

A. It goes on his 11-C, and it also will appear on the stamp so that the third copy of the assembly will indicate that. And that will be instructions to our mailing department to send him a Form 730 which he is required to file.

Q. And so, if he does indicate he is a principal each month he will receive from your office these Forms 730?

A. That is right.

Q. Pertaining to the payment of the excise tax?

A. That is right, sir.

Q. And, these are sent out automatically, I take it?

A. Automatically. By the same token, those that would be an agent wouldn't get the 730.

Q. But they would be required to state the name of the principal?

A. That is right, sir.

Q. At my request, Mr. Struble, did you make a personal investigation to determine if there was on file in your office during the time covered by this indictment—that is April of 1958 through April of 1961—any partnership return indicating the names of Anthony Grosso, Samuel Grosso, Jennie Gatta or Jennie Grosso, or Joseph Pino?

A. Yes, sir.

Q. You made such a search?

A. I made the search.

Q. And will you tell the jury what the results of that search were?

[fol. 396] A. I found no record of a partnership return, Form 1065, having been filed by any one or group of the names mentioned.

Q. Now, if a person is in business as a partnership rather than as an individual, is there a difference in a partnership return as opposed to an individual return?

A. Well the partnership return is a Form 1065 which is an information return, and no tax would be paid on it as such. But, on that return would be indicated the names of the partners and the distribution to each which they are required, which the individuals are required or the partners are required to reflect on their own income tax returns.

COLLOQUY

Mr. Reich: May I ask the indulgence of the Court while I consult with defense counsel, your Honor?

The Court: Yes.

(Interval)

Whereupon, Government's Exhibits No. 12 and No. 13 were marked for identification.

Mr. Reich: Your Honor, may I suggest that I think we can expedite this if we can have a five minute recess?

The Court: Shall we excuse the jury?

Mr. Reich: Yes, sir.

The Court: All right. We will take a recess until counsel is ready.

Please bear in mind the admonition, ladies and gentlemen of the jury, and the alternate jurors, not to talk among [fol. 397] yourselves or with anyone else on any matter connected with this case or to form or express any opinion of the case until it is finally submitted to the jury.

(Short recess.)

The Court: The Court will come to order.

Let the record show the presence of the defendant with counsel.

Are we ready to have the jury brought in now?

Mr. Reich: Yes, we are, your Honor.

The Court: All right.

(The jury was seated and the following proceedings were had in the presence of the jury.)

The Court: Let the record show the presence of the defendant with counsel.

Will counsel stipulate that all the members of the jury and the alternate jurors are present?

Mr. McLaughlin: Yes, your Honor.

Mr. Diamond: Yes, your Honor.

The Court: I just want to remind counsel of the fact of the rule of exclusion. Have you watched that?

Mr. Diamond: Yes, your Honor.

Mr. McLaughlin: Yes, your Honor.

The Court: All right.

[fol. 398] Whereupon, Government's Exhibits Nos. 12 through 41 were marked for identification.

By Mr. Reich:

Q. Mr. Struble, before offering these exhibits, there is one more form I would like you to explain to the jury, and that is the Form 899. Will you tell us what that is?

A. Form 899 is a Treasury Department, Internal Revenue Service form headed, "A Certificate of Assessments and Payments." It is a form that has been devised for the purpose of presenting the record of the District Director's office under certification by the District Directors, signed by him, and placed under his seal.

Mr. Reich: Your Honor, in order to expedite these proceedings, counsel for the Government and for defense counsel have agreed that I may offer each of these exhibits myself and let counsel indicate whether he has any objection to the offer.

At this time, I would like to offer United States Exhibit No. 12, a Form 899 caption, "Certificate of Assessments and Payments," pertaining to taxpayer Anthony Grosso, 840 Ridgeview Drive, Mt. Lebanon, Pittsburgh, Pennsylvania, pertaining to the period of time from July 1, 1957 through June 30, 1961, and this Certificate of Assessments and Payments pertains to the occupational wagering tax. That is the Form 11-C.

I now offer Government's Exhibit No. 12.

Mr. McLaughlin: No objection.

[fol. 399] The Court: It may be admitted, Exhibit No. 12.

Whereupon, Government's Exhibit No. 12 was received in evidence.

Mr. Reich: At this time I would like to also offer Government Exhibit No. 13 pertaining to the same taxpayer, the defendant, Anthony Grosso, pertaining to the payment of the excise tax on wagers; that is the Form 730, between the period of time of April, 1958, through April, 1961.

The Court: April what?

Mr. Reich: April, 1958 through April, 1961.

Mr. McLaughlin: No objection.

The Court: It may be admitted in evidence as Exhibit No. 13.

Whereupon, Government's Exhibit No. 13 was received in evidence.

* * * * * * *

Mr. Reich: Government Exhibit No. 19 is a Form 730 with an accompanying letter over the signature of Joseph A. Pino pertaining to the month of February, 1959. I don't know whether I indicated, this is also a Form 730.

The Court: Form 730.

Mr. McLaughlin: No objection.

The Court: Exhibit No. 19 is admitted.

* * * * * * *

[fol. 400] By Mr. Reich:

Q. Mr. Struble, I show you what has been admitted as Government Exhibit No. 12, and this is the Form 899 pertaining to taxpayer Anthony M. Grosso. Can you tell by looking at Government Exhibit No. 12 whether that defendant had filed a Form 11-C with the Internal Revenue Service during any part of the period from July 1, 1957 through June 30, 1961?

A. The Form 899 indicates that the records of the District Director's office indicate no records for this individual having filed.

The Court: That is Exhibit No. 12.

By Mr. Reich:

Q. And if there was an 11-C on file by this taxpayer, presumably your search would have turned it up?

A. Yes, sir.

Q. And if there is no 11-C on file, does that mean that the taxpayer did not pay the special occupational tax for engaging in the business of wagering during that period of time?

A. That is right.

Q. I ask you to refer to Government Exhibit No. 13 pertaining to taxpayer Anthony M. Grosso. Can you tell us by looking at Government Exhibit No. 13—

The Court: Do you know whether this tax form was filed? You made a statement that if your search didn't find it, it wouldn't be filed. Can you testify one way or another whether it was filed or not?

The Witness: A search was made, and if a return had been filed, the Director's office would have had a record of [fol. 401] it, and the certification here is that no record was found.

The Court: I see.

Mr. Reich: Strike my last question.

By Mr. Reich:

Q. I show you Government Exhibit No. 13 pertaining to the same taxpayer and the payment of the excise tax on the wagers. Did the District Director's office attempt to make a search to find if this taxpayer filed any excise tax returns during the period of time from April, 1958 through April, 1961?

A. A search was made and the Form 899 indicates that no record was found.

Q. And that would indicate that there is no Form 730 on file under the name of Anthony Grosso?

A. Yes, sir.

Mr. Reich: Your Honor, at this time I would like to read to the jury from the various tax returns filed by Samuel Grosso and Joseph Pino.

The Court: You want to read from the exhibits which were admitted into evidence?

Mr. Reich: Yes, your Honor.

The Court: You may do so.

Mr. Reich: Government Exhibits Nos. 14, 15 and 16 are Forms 11-C's which have been admitted as the special tax returns and application for registry—wagering, over the signature of Joseph A. Pino.

[fol. 402] In Government Exhibit No. 14, Joseph Pino in question two was asked to state his address. "Residence, 2816 Voekel Avenue, Pittsburgh 16, Pennsylvania. Business address, none."

In question three the statement is made, "Taxpayer intends to go in business in the near future."

Question four: "If taxpayer is a firm, partnership or corporation, give true name of members or officers.

"Answer: None.

"Number 5. Are you engaged in the business of accepting wagers on your own account?

"Answer: No.

"5-a. Name and address where each such business is conducted.

"Answer: None."

Part b of 5, "Number of employees and/or agents engaged in receiving wagers on your behalf?

"Answer: None.

"c. True name, current address and special tax stamp number of each such person.

"Answer: None.

"6. Do you receive wagers for or on behalf of some other person or persons?

"Answer: No."

Government Exhibit No. 15 pertaining to the fiscal year between July 1, 1958 to June 30, 1959, gives no answer to any of the questions below name and address.

Government Exhibit No. 16, the same tax return pertaining to the period from July 1, 1959 through June 30, 1960, and says in question number 5:

[fol. 403] "Are you engaged in the business of accepting wagers on your own account?

"Answer: Yes.

"Name and address where such business is conducted.

"Anywhere."

Government Exhibits 17 through 22 are the Form 730's which have been admitted in evidence over the signature of Joseph Pino. This pertains to the monthly payment of excise tax by Joseph Pino.

Pertaining to the month of September; 1958, the taxpayer stated that the gross amount of wagers accepted during the month, not including lay-off accepted, "none." That is question one.

Question six, "net tax due. None."

Government Exhibit No. 18 pertaining to the month 9-58 to 2-59 that is crossed out, as you see, "Gross amount of wagers accepted during month not including lay-offs accepted. None.

"Net tax due. None."

Government Exhibit No. 19 over the signature of Joseph A. Pino pertaining to the month of February, 1959, there is no answer to the question of gross amount of wagers accepted during the month not including lay-offs accepted. In answer to question three, "Est. $250,000.

"4. Tax, ten per cent of item three, $25,000.

"6. Net tax due, $25,000."

I would like to read the accompanying letter, which is part of this exhibit, over the signature of Joseph A. Pino.

"Director of Internal Revenue, Pittsburgh 30, Pennsylvania:

[fol. 404] "Regarding Form 730, Joseph A. Pino, 2816 Voekel Avenue, Pittsburgh 16, Pennsylvania, February, 1959, due 3-31-59.

"Gentlemen: Enclosed is Form 730 for February, 1959. On or about February 12, 1959, this operation was started. On February 19, 1959 there was a raid by Lieutenant James at which time all slips and information was seized.

It is estimated that there was done approximately $250,000 worth of business during this period. Enclosed is the ten per cent or $25,000 estimated tax.

"When these slips are made available for totals, a refund may be in order or a balance may be due to the Internal Revenue Service. All operations at the present time have ceased.

"Very truly yours, Joseph A. Pino."

Government Exhibit No. 20 pertains to the month of June, 1959, "Gross amount of wagers accepted during month, none.

"Net tax due, none."

Government Exhibit No. 21 pertaining to the month of July, 1959, "Gross amount of wagers accepted during month, none.

"Net tax due, none."

Government Exhibit No. 22, pertaining to the month of August, 1959, "Gross amount of wagers accepted during month, none.

"Net tax due, none."

Government Exhibits 23 and 24 are the 11-C's filed by Samuel J. Grosso, and these returns are over his signature.

* * * * * * *

[fol. 405] Redirect examination.

By Mr. Reich:

Q. Mr. Struble, how did you answer Mr. McLaughlin's question as to whether or not the practice of the District Director is to keep an alphabetical index of all persons [fol. 406] who pay the excise tax? How did you answer that question?

A. The record that is kept in the Director's office is of the occupational stamp tax for the stamp itself. There is no specific record kept of a Form 730, those that would file a Form 730, or any other of the excise taxes, or of a group of people who had filed income tax returns on a return basis.

Q. And if no such record is kept, no such record can be made available to the general public?

A. That is right, sir.

Mr. Reich: That is all.

* * * * * * *

[fol. 407] ANTHONY M. GROSSO, called as a witness in his own behalf, being first duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. McLaughlin:

* * * * * * *

[fol. 408] A. Well, after you paid for your help and your books, your gumbands, your clips, your attorney fees, your fines and the ones that didn't pay you, you had hardly anything to work with.

Q. Now, I take it that the gumbands and the paper clips weren't a major expense?

A. No.

Q. But the bonds, the attorney fees and that sort of thing, they were?

A. They were, yes.

Q. In the early days of the numbers business, was it customary for the bank—and I assume they called it a bank in those days, did they?

A. Yes, they did.

Q. —to pay for things like fines for the writers and attorney fees if someone would be arrested?

A. Yes.

Q. Now, in those early years, the fines were about really all that you were concerned with, was it not?

A. In the early years, they would pay the fines and costs and attorneys. And very few people went to jail for writing numbers. In those days, they did not do it. It was nothing but a fine.

Q. That was in the early years in the depression?

A. Yes.

Q. Now, after you came back out of the Army and continued in this partnership with your brother Sam, did the volume of your business increase?

A. Yes, it did.

Q. Where did you run the business?

[fol. 409] A. I ran the business up at Elm and Bedford. It was right around the corner from where I lived. It was a little storeroom there.

Q. Was that what you called the headquarters?

A. Well, you could call it a headquarters, but I would be in there and all the writers would come and turn in.

Q. Is that where the money would be counted and the adding machine tapes would be made up?

A. Yes.

Q. Now, when you personally were in the numbers business and working with your brother Sam, did you ever go to the headquarters?

A. Yes, I did.

Q. How often?

A. Every day.

Q. And, what would you do?

A. Oh, I would take care of the business to see that everything went right.

Q. Now, I think you said that the volume increased?

A. Yes, it did.

Q. Over the years?

A. Yes.

Q. Now, in 1950, where did you run your numbers business?

A. In 1950, I was still up at Elm and Bedford. We would gather the business there, and then we would—oh, we would be all over the Hill for our headquarters, and sometimes we would be in my home.

Q. And what happened in 1950?

A. I was arrested in 1950.

Q. Where?

A. At my home.

[fol. 410] Q. Were you indicted?

A. Yes, I was.

Q. And subsequently convicted?

A. I was convicted and sentenced to jail for six months.

Q. In the Allegheny County Workhouse?

A. At the Workhouse.

Q. I believe some other people were arrested with you at your home?

A. My brother, my sister, my brother-in-law, and I think a Mr. and Mrs. Pace, and a girl by the name of Anderson. And I think another fellow by the name of Sam Saber.

Q. As a result of that arrest, was there a trial?

A. Yes.

Q. In the State Court?

A. Yes.

Q. Now, as a result of that arrest, what did you do with respect to the numbers business, if anything?

A. I quit the numbers business.

Q. Why?

A. Well, my daughter was about six years old, going on seven. And after we were arrested in my home, the kids wouldn't want to talk to her. And so, I quit the numbers business, and we moved to another section of Mt. Lebanon, and we built a home there.

Q. What was the condition of your health at that time?

A. I was sick. I had ulcers.

Q. The same stomach disorder that you had had in the Army?

A. Yes.

[fol. 411] Q. Prior to this arrest which led to your conviction in 1950, before that time did persons engaged in the numbers business have to have any federal gambling stamps or pay any federal gambling taxes, or do you know?

A. No, sir. We didn't have to have stamps or anything like that.

Q. Did you ever hear, or have you ever heard, when the gambling stamps came into play, when you had to have them?

A. Yes.

Q. When?

A. Well, when the stamp came out.

Q. When did the stamp come out?

A. I would say in 1950 or 1951.

Q. Now, what did you do with your business in 1950?

A. I quit and I gave it to my brother Sam.

Q. And, to the rest of the family, or did you give it all to him?

A. I gave it to him.

Q. In other words, it became his business?

A. Yes.

Q. Did you keep a piece of it?

A. No, sir.

Q. And I think that trial was around 1952, is that right? 1951 or 1952?

A. I think so. Something like that.

Q. And you then went to the Allegheny County Workhouse?

A. Yes, I did.

Q. And you were there for how long?

A. I was only in the Workhouse for about two weeks when I contracted a bleeding ulcer.

[fol. 412] Q. And from the Workhouse where did you go?

A. They took me to the St. Francis Hospital.

Q. And what happened there?

A. I was operated on, and they took my ulcers out. They took two-thirds of my stomach out.

Q. They removed part of your stomach?

A. Two-thirds, yes.

Q. And then, ultimately after that, you went back and served the remaining portion of the sentence?

A. Well, I stayed about forty days in the St. Francis Hospital, and then from there I went back to the Workhouse, and I was paroled.

Q. And ultimately or later on, you went back to the Workhouse and served out the remainder of the time?

A. Yes, I did.

Q. Now, before you quit the numbers business in 1950, I think you told us that it had grown in volume?

A. Yes, it did.

Q. Did you have any competition at all, or did you have the whole town?

A. Yes, I had competition.

Q. A fair amount of competition?

A. Yes, I did.

Q. During this period prior to 1950 when you and your brother Sam operated the business in a 50-50 partnership, did your name, the name Grosso, become fairly familiar in lottery circles, numbers circles?

A. Yes, sir, it did.

Q. At the same time, were there also other well-known names in the lottery business or numbers business in those years?

A. Yes, there were.

[fol. 413] Q. Why is it that you seem to have the opinion that because the odds were 700 or 800-to-1 that the business wasn't profitable? What difference would the odds make?

A. Well, if you had to pay people at a 700-to-1 and 800-to-1, you had hardly anything to work with.

Q. Why?

A. Well, the percentage, that is all you actually work on. You would have to be awful lucky to win a lot of money. The only other thing we ever done with the business was by the time we would pay our hits and pay the cost of what it would cost us to run this business, we hardly had anything to work on.

Q. You mean the lower the odds, the better it is for the bank?

A. Yes.

Q. It gives you more to work with?

A. Well, the lower the odds, the more money we could make.

Q. In other words, in those years, if someone hit for a dollar, they got $800?

A. Yes, they did.

Q. How many numbers were there in those days?

A. In those days, we had, oh, we had the stock number and we had the race number. I think there were two numbers.

Q. In the early days, when you first started in the business as a kid, how many numbers were there?

A. One number. There was a stock number.

Q. The race number came in later?

A. The race number came in, oh, I would say around 1940, and the only reason why the race number came in was that we didn't trust the stock number. We had so [fol. 414] many hits on the stock number that we tried to go on to another number, so we figured in taking the race number, by it going through the pari-mutuel machines, that no one could steal from it. So we adopted that number.

Q. You say you didn't trust the stock number. What do you mean by that?

A. Well, we couldn't make any money with the stock number. We thought the number was fixed.

Q. Because of the number of hits?

A. Hits, too many hits.

Q. After you had your stomach removed, what did you do as far as working or making a living goes?

A. Well, I was helping my wife run the Horseshoe Bar and I did a little bit of gambling.

Q. Now, in 1956, did you go into any business?

A. Yes. My wife and I built a place called the West Liberty Car Wash at 1804 West Liberty Avenue.

Q. That is up here on the other side of the Tubes?

A. Yes.

Q. What kind of a car wash was it?

A. A very nice car wash.

Q. One of those automatic kind?

A. Yes, those one-minute car washes.

Q. Did you form a corporation to do that?

A. Yes, we did.

Q. Did you hold some position in the corporation?

A. I was the president.

Q. How long did you continue to operate that?

A. Well, I continued to operate that until, oh, about two, two and a half years ago.

Q. Do you still own it?

A. Yes, I do.

[fol. 414a] Q. What do you do with it now?

A. I lease it out.

Q. You rent it to somebody and let them operate it?

A. Yes.

Q. When you started the car wash, where did you get the money to do that?

A. Well, when we opened up the car wash, I had borrowed money from my home and we borrowed money from the Brookline Bank and from my father-in-law.

Q. When you say you borrowed money from your home, you mean you mortgaged your house?

A. I mortgaged my home, right.

Q. And after you got into this car wash business, did either you or your wife get into any other type of business?

A. My wife bought a place out past Mount Lebanon called Bethel Park, a place called the Living Room.

Q. And what is the Living Room?

A. It is a cocktail bar and a restaurant.

Q. Is that owned by your wife individually, or is that owned by a corporation, or what?

A. That is owned by my wife and her brother. It is a corporation.

Q. It is a corporation?

A. Yes.

Q. Aside from the car wash company and the company that owns and operates the Living Room, do you and your wife have any other business interests?

A. Well, we closed up the Horseshoe Bar. We had the lot next door to the West Liberty Avenue Car Wash, and

I have—we have property over on the South Side and we have some property up in the Hill District.

[fol. 415] Q. These properties produce income?

A. Yes.

Q. Now, during the past, oh, five or six years, or say six or seven years, in addition to working around this car wash, I take it you did take some part in the operation of it?

A. Yes, I was the president and I work there.

Q. I mean, did you go there?

A. Yes, I did, every day.

Q. I assume you didn't wash the cars, you—

A. No, I supervised.

Q. —just supervised?

A. Supervised, yes.

Q. In addition to that activity, and aside from your real estate activity, did I understand you to say that you did some gambling?

A. Yes, I did.

Q. What do you mean when you say you did some gambling?

A. Well, I have gambled in Miami Beach, Florida. I have gambled in Atlantic City. I have gambled in New York. I have been at Waterford Park.

Q. And when you say gambling, do you mean playing or booking?

A. Playing.

Q. Is there a difference between bookmaking and gambling?

A. Yes.

Q. What is the difference?

A. Well, a bookmaker takes a bet and a gambler plays it.

[fol. 416] Q. You have gambled, you say, in various cities around the country, Florida and—

A. Well, mostly in Florida.

Q. What type of games do you play? What kind of gambling do you do?

A. Well, I play an awful lot of gin rummy, and sometimes I would shoot crap, and I also bet horses.

Q. And this activity, this gambling activity, does it generate income?

A. Yes.

Q. In other words, you win more than you lose?

A. Yes, I did.

Q. Did you win substantial amounts of money?

A. Yes, I have.

Q. Have you lost substantial amounts of money?

A. Yes, I have.

Q. Now, for instance, these card games that you talked about, are these games for what we call high stakes?

A. Sometimes.

Q. Now, you don't have a gambling stamp, do you?

A. Well, for that kind of gambling, you don't need a stamp.

Q. Do you know whether you have to pay tax on that kind of gambling?

A. Yes, I do.

Q. What kind of tax do you have to pay?

A. No tax.

Q. No excise tax?

A. No.

Q. Do you, however, have to pay income taxes on your winnings?

A. Yes.

[fol. 417] Q. Do you?

A. Yes, I do.

Q. Approximately how much have you reported in your income tax returns over an average of the last four or five, five or six years from gambling income?

A. Oh, around $50,000 a year.

Q. And you have paid tax on that?

A. Yes, I have.

Q. You have paid income tax on it?

A. Yes.

Q. Have you ever had any problems with the income tax authorities or the Internal Revenue Service over your income tax?

A. No, sir.

Q. By the way, I assume you don't make up your own income tax?

A. No, I don't.

Q. It is handled by someone else?

A. Yes.

Q. Is it handled by a CPA?

A. Yes.

Q. Well, if you have been reporting on your income tax around $50,000 a year, which you tell us are approximately your winnings from these gambling activities, I would take it that some of these games are for fairly high stakes?

A. Yes, sir.

Q. And when you say—did you say you occasionally shoot dice?

A. Shoot dice. I play poker.

Q. When you say you shoot dice, do you mean you play craps?

[fol. 418] A. Yes, craps. A game called crap.

Q. Is this a fairly high-staked game?

A. Yes.

Q. Have you won fair amounts on the horses?

A. Yes, I have.

Q. Do you spend some time in Florida?

A. Yes, I do.

Q. When, in the winters?

A. In the winter.

Q. Do you go down during the racing season?

A. I go down in the racing season.

Q. Do you also occasionally follow sporting events?

A. Yes, sir.

Q. Where, here and in other parts of the country?

A. Yes.

Q. By the way, speaking of your income tax returns, do you know whether those returns are audited every year by the Internal Revenue Service?

A. Yes, sir, they are.

Q. In other words, someone goes over them and your accountant tells you they have talked to him about them?

A. Yes.

Q. Have they been accepted every year?

A. Yes, they have.

Q. Without adjustment?

A. I think so.

Q. Now, how do you arrive at figuring out what your winnings are at the end of the year from gambling, from playing cards, shooting crap, going to horse races?

A. Well, I would take so much money with me and I would—this would be almost my net income from the gambling after my living expenses were taken out in [fol. 419] Florida; that is, eating, sleeping, my hotels, and I would take the money and take it home and put it in my drawer and at the end of the year, what I have left, I would file my income tax on.

Q. Or you would tell your accountant and he would file it?

A. Yes.

Q. Now, have you been gambling in a large way since about 19 what, 1955 or 1956?

A. I would say since 1954, 1955, 1956 and on up.

Q. In addition to gambling, playing the horses, shooting crap, and playing poker and gin, you also had an income from your property?

A. Yes, I have.

Q. Approximately how much income do you have from your real estate holdings?

A. Oh, I would say $20,000 a year.

Q. Now, during the years up to 1950 when you—

The Court: What was your question, Mr. McLaughlin?

By Mr. McLaughlin:

Q. During the years up to 1950 when you and your brother Sam operated a lottery business as a partnership, did you take an active part in the operation of the business, or were you sort of a silent partner who never went around?

A. No, I took an active part.

Q. As a matter of fact, in 1950 when you and your brother Sam and some others were arrested, the headquarters was right in your house, wasn't it?

A. Yes, sir.

* * * * * * *

[fol. 420]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14810

UNITED STATES OF AMERICA, Appellee,

v.

ANTHONY M. GROSSO, Appellant.

Appeal From the Judgment and Order of the United States District Court for the Western District of Pennsylvania.

Argued April 20, 1965

Before McLaughlin, Staley and Smith, Circuit Judges.

OPINION OF THE COURT—Filed March 25, 1966

By SMITH, Circuit Judge.

The appellant was tried by a jury and convicted on twenty counts of an indictment charging violations of the Gam-

[File endorsement omitted]

bling Tax Act of 1954 as amended, 26 U.S.C.A., §§ 4401 and 4411, and related provisions of § 7203 of the same title. On each of said counts he was fined $10,000 and sentenced to a term of imprisonment of one year. He was convicted also on a single count charging conspiracy to defraud the United States, 18 U.S.C.A., § 371, and was thereon fined $1,000 and sentenced to a term of imprisonment of one year. [fol. 421] It was ordered that nine terms of imprisonment were to run consecutively and the others were to run concurrently with the term of imprisonment imposed on count 2. The present appeal is from the judgment entered on this verdict.

The appellant raises several questions, the most important of which is the following: whether, in the absence of both defendant and his counsel, and without notice, the substantial rights of the defendant were abridged by the action of the trial judge when, in response to an unrecorded note from the jury, he transmitted his reply, through the bailiff, without recalling the jury to the courtroom. The question is troublesome because of the wholly inadequate and badly confused record from which it is impossible to accurately reconstruct the incidents giving rise to the situation. We should add that the briefs on the question leave much to be desired.

After a trial which consumed more than four weeks, the instant case was submitted to the jury at approximately 4:15 P.M., on Wednesday, March 4, 1964. Thereafter deliberations continued until 11 P.M., when the jurors retired for the night. The following morning, at approximately 11:30 A.M., shortly after deliberations had been resumed, the jury sent a note to the judge purportedly indicating their inability to reach a verdict. Without notice to the appellant or his counsel, and in their absence, the judge instructed the jury, through the medium of the bailiff, to continue its deliberations. There was no record made of either the contents of the note[1] or the substance of the

[1] The note was lost but it appears from the record that its content was similar to that of a second note, to which reference is made in the body of the opinion.

judge's response. Although informed of the occurrence shortly afterward, counsel for the appellant interposed no objection and failed to request corrective action by the Court.

It was obvious error for the trial judge to instruct the jury, in the absence of the appellant and his counsel, with- [fol. 422] out notice to them. *Shields* v. *United States*, 273 U.S. 583, 588 (1927); *United States* v. *Neal*, 320 F. 2d 533, 536 (3rd Cir. 1963); *Jones* v. *United States*, 308 F. 2d 307, 311 (D.C. Cir. 1962); *Evans* v. *United States*, 284 F. 2d 393, 394 (6th Cir. 1960). It was likewise error to convey these instructions to the jury through the medium of the bailiff. *Henderson* v. *United States*, 204 F. 2d 126 (6th Cir. 1953); *Wheaton* v. *United States*, 133 F. 2d 522, 526 (8th Cir. 1943). These errors do not warrant reversal in the absence of prejudice to the substantial rights of the appellant.

However, if appellant's counsel was of the opinion that the errors were prejudicial it was his obligation to interpose a timely objection and seek corrective action by the Court. *United States* v. *Woodner*, 317 F. 2d 649, 651 (2nd Cir. 1963), cert. den. 375 U.S. 903; *United States* v. *Agueci*, 310 F. 2d 817, 840 (2nd Cir. 1962), cert. den. 372 U.S. 959; *United States* v. *Williams*, 271 F. 2d 434, 437 (7th Cir. 1959), cert. den. 361 U.S. 961. He should have taken this course when he learned of the errors, but failed to do so. A defendant may not sit idly by in the face of obvious error and later take advantage of a situation which by his inaction he has helped to create. *United States* v. *Agueci, supra.*

Although not required to do so, we are empowered to consider the alleged errors on the merits if they affected the "substantial rights" of the appellant. FED. RULES CR. PROC., rule 52(b), 18 U.S.C.A.; *United States* v. *Provenzana*, 334 F. 2d 678, 690 (3rd Cir. 1964), cert. den. 379 U.S. 947; *Ramsey* v. *United States*, 332 F. 2d 875, 877 (8th Cir. 1964); *United States* v. *Vasen*, 222 F. 2d 3, 5, 6 (7th Cir. 1955), cert. den. 350 U.S. 854; *United States* v. *Jones;* 204 F. 2d 745, 749 (7th Cir. 1953), cert. den. 346 U.S. 844. The power is discretionary and should be exercised only in those situa-

tions in which the failure to do so would result in a manifest miscarriage of justice. *Ibid.* We do not have such a situation in the instant case.

[fol. 423] We find upon our review of the record that the evidence as to the appellant's guilt was overwhelming and that therefore there was no reasonable likelihood that the judge's instruction to the jury influenced the verdict. We are of the opinion that under the circumstances reversal on the ground urged is not warranted. *Walker* v. *United States*, 322 F. 2d 434, 436 (D.C. Cir. 1953), cert. den. 375 U.S. 976; *United States* v. *Compagna*, 146 F. 2d 524, 528 (2nd Cir. 1944), cert. den. 324 U.S. 867. The case of *United States* v. *Neal, supra*, upon which the appellant relies, is distinguishable from the case now before us.

Following the above described incident the jury continued deliberations until 10:50 P.M. Shortly thereafter the bailiff in charge reported to the Court that one of the female jurors had been injured and that another had become ill. We are here concerned only with the ill juror. After she was given medical attention the physician reported to the judge by telephone that she was suffering from a nervous disorder, the exact nature of which is not disclosed by the record. This information was imparted to defense counsel, who had been summoned to the judge's chambers by a deputy marshal. The physician's report was apparently never reduced to writing; in any event, its content was not made a part of the record. The juror was again examined by the physician on the following morning. It would appear that the results of this examination were reported to the Court but were likewise not incorporated into the record.

Counsel for the parties met with the trial judge in his chambers on the morning of Friday, March 6, 1964, at which time they were informed that the juror was still ill but that the jury would be able to resume deliberations later in the day. Defense counsel objected to the resumption of deliberations and moved for a mistrial and the discharge of the jury. He argued that because of the illness of the juror,

further deliberations might result "in some sort of a compromise verdict." The motion was denied and jury deliberations were suspended until the following day.

[fol. 424] On the morning of Saturday, March 7, the juror was again examined by the physician, who reported to the deputy marshal that she was still ill. However, the condition of the juror was apparently such that the jury was able to resume deliberations at 2:45 P.M. Shortly thereafter the information which the deputy marshal had received from the physician was transmitted to the trial judge in the presence of counsel. Defense counsel again renewed his motion for a mistrial and the discharge of the jury on the grounds urged earlier. The motion was denied. The trial judge then asked counsel if they would consider stipulating "that [the] case could continue * * * with a jury of eleven." Defense counsel refused to so stipulate.

While counsel for the respective parties were in conference with the judge in chambers, the judge received a second note from the jury reading as follows:

> "I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request."

Again the trial judge failed to recall the jurors to the courtroom. He stated to counsel: "We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So, I think we will just tell them we got their message and tell them to keep on working." Defense counsel interposed no objection to the proposed action of the trial judge and made no request that the jury be recalled to the courtroom for further instructions. The bailiff was instructed to tell the jurors, "I have got their message and I suggest they keep on working." We assume

that this message was conveyed to the jury, which continued its deliberations for approximately five hours. A verdict [fol. 425] was returned at 8:30 P.M., and thereafter, at the request of defense counsel, the jurors were polled and each assented to the verdict as reported by the foreman.

When the jury returned its verdict the physician who had examined the ill juror was available in the courtroom and this was made known to the Court. Defense counsel requested that the physician be permitted to make his report; this occurred at 9:30 P.M. The Court denied the request stating, "I am not going to bring that up here at this time at all." However, it must be noted that on the previous day the trial judge advised defense counsel that in the event of conviction he could offer the testimony of the physician in support of a motion for a new trial. This motion was made in due course but neither the report of the physician nor his testimony was offered in support of it. It is reasonable to assume that the failure of defense counsel to produce this evidence was prompted by his deliberate choice.

The appellant challenges the verdict as void on the ground that it was the product of judicial coercion. He argues that under the circumstances of this case the prolonged confinement of the jury, coupled with the illness of the juror, constituted duress. We do not agree.

The length of time a jury may be kept together for the purpose of deliberation is a matter within the discretion of the trial judge, and his action in requiring further deliberation after the jury has reported a disagreement does not, without more, constitute coercion. *De Vault* v. *United States*, 338 F. 2d 179, 182 (10th Cir. 1964); *Mills* v. *Tinsley*, 314 F. 2d 311, 313 (10th Cir. 1963), cert. den. 374 U.S. 847; *United States* v. *Minieri*, 303 F. 2d 550, 556 (2nd Cir. 1962), cert. den. 371 U.S. 847, and the cases therein cited. However, it has been held that such action, when accompanied by other circumstances, may be coercive. See *United States* v. *Pleva*, 66 F. 2d 529 (2nd Cir. 1933). The illness of a juror may be regarded as such a circumstance, but

only where it appears from the evidence that the verdict [fol. 426] was induced by the juror's condition. *Id.* There is no such evidence in this case.

Against these critical omissions by the appellant stands the fact that the jury was polled after it returned its verdict. The object of a jury poll is "to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus to enable the Court and the parties to ascertain with certainty that a unanimous verdict has in fact been reached and that *no juror has been coerced or induced to agree to a verdict to which he has not fully assented.*" *Miranda* v. *United States,* 255 F. 2d 9, 16 (1st Cir. 1958). (Emphasis added). *Humphries* v. *District of Columbia,* 174 U.S. 190, 194. Since each of the jurors assented to the verdict as reported by the foreman, the verdict should not be set aside in the absence of some proof that coercion in fact existed. Contrary to the appellant's contention, the facts of the case do not speak for themselves.

There are several other questions raised on this appeal. These questions relate to: the admission of certain exhibits allegedly procured as a result of illegal searches and seizures; the denial of a motion to dismiss the indictment made prior to trial; the legality of the sentences; and, the constitutionality of § 4401 of Title 26 U.S.C.A. It is necessary that these questions be treated separately.

Admission of Testimony

The exhibits in question were seized in searches conducted at various places at different times. Prior to trial these exhibits were made the subject of a motion to suppress evidence filed by the appellant and three other defendants under rule 41 (e) of Fed. Rules Cr. Proc., 18 U.S.C.A. This motion was denied, *United States* v. *Grosso,* 225 F. Supp. 161. A separate trial was granted the appellant on his motion for a severance filed under rule 14 of Fed. Rules Cr. Proc., 18 U.S.C.A. The arguments of the

[fol. 427] defendant relating to the admissibility of the exhibits will be separately discussed.

A

It appears from the testimony of one Hannan, corroborated by his wife, that he was engaged in the operation of a numbers lottery and, between August of 1957 and April of 1961, was operating under an agreement to "lay off" his daily wagers with the appellant in return for a commission and a share of the profits. The relationship of the defendant to Hannan was that of a "banker." On April 27, 1960, special agents of the Internal Revenue Service, armed with a search warrant, raided the Hannan home, where they seized a notebook containing a daily record of Hannan's business and his transactions with the appellant. This notebook was a significant item of proof in the government's case.

At the trial Hannan was called as a witness and he testified at length as to the nature and extent of his daily business with the appellant. During his testimony the notebook was produced, identified by him as his personal record, and offered in evidence. The appellant interposed no objection to the testimony which preceded the offer but objected to the admission of the notebook on the ground that its seizure was illegal. The arguments advanced in support of the objection were confusing and difficult to follow. The objection was overruled and the exhibit was received.

The appellant here contends that: the search warrant was void; it was unlawfully executed; and, the special agent lacked authority to execute it. We find it unnecessary to consider these contentions, here raised for the first time.

It clearly appears from the undisputed evidence in the record that the premises searched were owned and occupied by Hannan and that the notebook seized was a personal record kept by him in the operation of his illegal business. The person against whom the search was directed was Hannan. There is nothing in the record to show that the

[fol. 428] appellant had the requisite legal interest in either the premises or the notebook and at no time did he claim such an interest. The appellant, relying on *Jones* v. *United States,* 362 U.S. 257 (1960), maintains that he was not required to establish such an interest as a condition precedent to his right to challenge the constitutionality of the search and seizure. This reliance is misplaced and demonstrates the penchant of defense counsel for misreading cases.

The defendant in the *Jones* case was tried and convicted on each of two counts of an indictment charging violations of federal narcotics laws. The first count charged him with having "purchased, sold, dispensed and distributed" narcotics in violation of 26 U.S.C.A. § 4704(a). The second count charged him with having "facilitated the concealment and sale of" narcotics, knowing the same to have been imported illegally, in violation of 21 U.S.C.A., § 174. In a prosecution under either of these statutes the conviction of the accused may rest solely on proof of possession. It is obvious that in such a prosecution an accused may not assert a possessory interest in the property seized without admitting his guilt.

The Court held that under such circumstances a defendant may raise the constitutional question without alleging or establishing, as a condition precedent, the requisite legal interest in the premises searched or the property seized. See *Contreras* v. *United States,* 291 F. 2d 63 (9th Cir. 1961). The Court held further that an accused is a "person aggrieved by an unlawful search and seizure" within the meaning of rule 41(e), *supra,* if his conviction on the criminal charge made against him may be based solely upon proof of possession.

The appellant's interpretation of the *Jones* decision, if adopted, would completely vitiate the requirement of "standing." This was clearly not the intention of the Supreme Court. The Court held, consistently with earlier decisions, at page 261: "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must

[fol. 429] have been a victim of a search or seizure, one against whom the search was directed, *as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.*" (Emphasis supplied). The Court then stated, "Ordinarily, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

As we interpret the decision, the Court confirmed the general rule but created an exception applicable only in a limited class of cases, those cases in which an accused has a choice of asserting an interest in the property, thus admitting guilt, or foregoing his right to challenge the constitutionality of the search and seizure. We are of the opinion, and so hold, that the facts in the instant case do not bring it within the exception. See *United States* v. *Konigsberg,* 336 F. 2d 844, 847 (3rd Cir. 1964), cert. den. sub nom. 379 U.S. 930. The appellant herein was tried and convicted of a number of offenses, none of which involved the element of possession.

We have considered the other grounds urged in support of the defendant's claim to standing but find them equally without merit.

B

In the search of the premises of one Lovejoy, located in Bethel Park, Mt. Lebanon Township, local police officials seized "two black books" which apparently contained some evidence as to the operations of a numbers lottery. The circumstances under which the search and seizure were made are set out in detail in the opinion of the District Court, *supra.* On the motion to suppress the evidence it was contended that the search and seizure violated the constitutional rights of the defendants, including those of the ap- [fol. 430] pellant. The contention was dismissed as without merit. The appellant here argues that the decision of

the court below was erroneous. We do not agree. However, we find it unnecessary to consider the constitutional issue because of the circumstances under which the evidence was offered and received at the trial.

Prior to trial the district attorney represented to the Court that the evidence seized in the search of the Lovejoy premises would not be offered. The evidence was not offered in the government's direct case. The appellant took the stand in his own defense and, under examination by his counsel, not only denied his complicity in the offenses with which he was charged but also testified affirmatively that he had in no way been connected with the operations of a numbers lottery since late in 1950. He further testified that since that time he had been engaged in nothing but legitimate business enterprises.

In rebuttal the government introduced the testimony of a local police official who identified the books as having been seized in the search of the Lovejoy premises. He testified as to efforts made by the appellant to obtain possession of the books by bribery. The evidence, including the books, was offered for the limited purpose of refuting the appellant's sweeping claim that he had not been engaged in the numbers lottery since 1950. The jury was carefully and properly so instructed.

The appellant argues here, as he did in the court below, that receipt of the evidence was precluded by the government's pretrial representation that it would not be used. We cannot agreed. Any advantage that the appellant could have derived from the representation was waived when he testified, under direct examination by his own counsel, that he had not been engaged in the numbers lottery since late in 1950. Under the circumstances the government was not required to stand idly by and let the testimony go unchallenged. The case of *Walder* v. *United States*, 347 U.S. 62 (1954), although factually distinguishable, clearly supports this result.

[fol. 431] In the *Walder* case it was stated at page 65:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. . . .
>
> "Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the *sweeping claim that he had never dealt in or possessed any narcotics.* Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." (Emphasis supplied).

C

A search of the premises of one Betts, located in Jefferson Borough, resulted in the seizure of certain evidence, the nature of which is not disclosed. The appellant concedes that this evidence was neither offered nor received at the trial but contends only that it was improperly used in the computation of his tax liability for certain periods covered by the respective counts of the indictment. We find nothing in the record to support the contention that the evidence was so used; in fact, the undisputed testimony is clearly to the contrary. Therefore we find it unnecessary to consider the appellant's attack on the constitutionality of the search.

[fol. 432] D

During an investigation of gambling in the area of Pittsburgh, local police officials obtained information that the Calvary Cemetery was being used as a "numbers drop," an exchange point at which lottery wagers were delivered surreptitiously to the representatives of the "bank." On November 27, 1959, while the cemetery was under surveillance, the police observed one Petraglia arrive on the scene in a blue Chevrolet. Shortly thereafter other vehicles arrived and their occupants[2] were observed depositing envelopes and brown paper bags in the Petraglia car. The police knew from experience and their earlier investigation that this was a customary method of delivery employed by numbers operators. They moved in, arrested Petraglia, immediately searched his car and found the envelopes and bags containing thousands of lottery slips. The arrest and search were made without a warrant.

It clearly appears from the undisputed evidence, which we find unnecessary to summarize, that the police had reasonable grounds and probable cause to believe that Petraglia and others they observed on the scene were engaged in the operation of a lottery in violation of Pennsylvania law. This seems to be conceded by the defendant. However, he argues that the absence of a warrant rendered unlawful the arrest and the search which followed. We cannot agree. The urgency of the situation which confronted the police was sufficient to excuse their failure to obtain a warrant. *Draper* v. *United States,* 358 U.S. 307 (1959); *United States* v. *Rabinowitz,* 339 U.S. 56 (1950). Petraglia was in a moving vehicle apparently ready to flee as the police approached; in fact, his flight and that of one Berkowitz, who was in another car, was prevented when the police blocked the roadway with their vehicles. The case of *McDonald* v. *United States,* 335 U.S. 451 (1948), on

---

[2] As a result of earlier investigations these persons were known to the police as "runners" or numbers operators.

which the defendant relies, is distinguishable on its facts and therefore inapposite.

[fol. 433] Assuming the illegality of the search, we find the appellant lacked the standing to challenge it. *Jones* v. *United States, supra; United States* v. *Konigsberg, supra.* In his pretrial motion to suppress the evidence he neither alleged nor established the requisite interest in either the automobile searched or the property seized. At the trial of the action the appellant was in no better position to object to the admission of the evidence.

Denial of Motion to Dismiss Indictment

Pursuant to rule 12(b)(2) of the Fed. Rules Cr. Proc., 18 U.S.C.A., the appellant moved for dismissal of the indictment on the ground that it was predicated at least in part on illegally seized evidence. The denial of this motion is urged as a ground for reversal. It is well established that an indictment is not open to challenge on the ground that the evidence presented to the grand jury was either inadequate or incompetent. *Lawn* v. *United States,* 355 U.S. 339, 349, 350 (1958); *Costello* v. *United States,* 350 U.S. 359, 363, 364 (1956); *United States* v. *Labate,* 270 F. 2d 122 (3rd Cir. 1959), cert. den. 361 U.S. 900; *Coppedge* v. *United States,* 311 F. 2d 128, 132 (D.C. Cir. 1962), reversed on other grounds 369 U.S. 438; *United States* v. *Aviles,* 274 F. 2d 179, 191 (2nd Cir. 1960).

Alleged Illegality of Sentences

The appellant contends that the trial judge erred in imposing a separate sentence on each of fifteen counts charging him with the failure to pay the excise taxes due for specified monthly periods. This contention was held by this Court to be without merit in the case of *United States* v. *Minker,* 312 F. 2d 632, 636 (1962), cert. den. 372 U.S. 953, which is not mentioned in either brief.

Constitutionality of Statute

The appellant challenges the constitutionality of § 4401 of Title 26 U.S.C.A., under which a tax is imposed on [fol. 434] wagers as defined in § 4421 of the same title. He argues that the requirement that he file a tax return stating the gross amount of the wagers received violates his constitutional privilege against self-incrimination. This argument is predicated on an alleged possibility of exposure to prosecution under local law. We have found no regulation under which such returns may be made available to local police and there is no evidence in the record that they are. The only public record available for inspection is an alphabetical list of the names of all persons who have paid special taxes under the Gambling Tax Act, *supra.* 26 U.S.C.A. § 6107.

A constitutional issue similar to that raised here was considered and decided by the Supreme Court in *Lewis* v. *United States,* 348 U.S. 419, 422 (1955). The issue was disposed of on the following basis:

> "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, as in this case, he cannot be compelled to testify and may claim his privilege. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax."

This rationale is applicable here. See *United States* v. *Costello,* 352 F. 2d 848, 851 (2nd Cir. 1965).

The imposition of a tax on wagers was a valid exercise of the federal taxing power. *United States* v. *Kahriger,* 345 U.S. 22, 31, 32 (1953); see also *Lewis* v. *United States,* [fol. 435] *supra.* When the appellant voluntarily elected to engage in the business of accepting wagers he was required to pay the occupational tax imposed by § 4411 and the excise taxes imposed by § 4401. The requirement that he file a return was intimately related to the collection of the latter taxes and is therefore supportable as a proper enforcement measure. Under the rationale of the *Lewis* case, the possibility "of incrimination for future or even past acts, however great, is irrelevant . . ." *United States* v. *Costello, supra.*

If, as the appellant now contends, the form of return would call for the disclosure of potentially incriminatory information, the objection should have been raised in the return. See *United States* v. *Sullivan,* 274 U.S. 259, 263 (1927). The appellant may not refuse to pay the excise taxes lawfully due and then claim immunity from prosecution for this refusal on the ground that the requirement of a return per se violates his privilege. *Id.* at 264. Since he failed to file the returns "it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for." *United States* v. *Kahriger, supra; Lewis* v. *United States, supra,* at 33.

An argument similar to the one made here was advanced in *United States* v. *Joseph,* 278 F. 2d 504 (3rd Cir. 1960), cert. den. 364 U.S. 823, and was therein held to be without merit.

The judgment of the court below will be affirmed.

[fol. 436]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,810

UNITED STATES OF AMERICA

vs.

ANTHONY M. GROSSO, SAMUEL J. GROSSO, JENNIE B. GROSSO, JOSEPH PINO

ANTHONY M. GROSSO, Appellant

(D.C. Criminal No. 62-281)

On Appeal From the United States District Court for the Western District of Pennsylvania

Present: McLaughlin, Staley and Smith, *Circuit Judges.*

JUDGMENT—March 25, 1966

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 10, 1964, be, and the same is hereby affirmed.

March 25, 1966

[File endorsement omitted]

[fol. 437] Petition for Rehearing en banc covering 22 pages filed April 9, 1966 omitted from this print.

It was denied, and nothing more by order. May 3, 1966

[fol. 438]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,810

UNITED STATES OF AMERICA, Appellee,

v.

ANTHONY M. GROSSO, Appellant.

ORDER DENYING PETITION FOR REHEARING IN BANC—
May 3, 1966

Present: Staley, Chief Judge, McLaughlin, Kalodner, Hastie, Ganey, Smith and Freedman,* Circuit Judges.

The petition for rehearing filed by Anthony M. Grosso in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

William F. Smith, Judge.

Dated: May 3, 1966

[File endorsement omitted]

[fol. 439] Clerk's Certificate to foregoing transcript (omitted in printing).

---

* Judge Freedman would grant rehearing.

[fol. 440]

SUPREME COURT OF THE UNITED STATES

No. 181—October Term, 1966

ANTHONY M. GROSSO, Petitioner,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 41.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 28 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. ~~1963~~ 12

ANTHONY M. GROSSO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219
Attorney for Petitioner

CHARLES ALAN WRIGHT
2500 Red River St.
Austin, Texas 78705
Of Counsel

SMITH BROS. CO. INC., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of Case	3
Reasons for Granting the Writ	5
Conclusion	13
Appendix A — Provisions Involved	14
Appendix B — Opinions and Judgments Below	17

TABLE OF CITATIONS

CASES

Ah Fook Chang v. United States, 91 F.2d 805, 810 (9th Cir. 1937) 10, 12

Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965) 5, 7

Arrington v. Robertson, 114 F.2d 821, 823 (3d. Cir. 1940) 9

Costello v. United States, 86 S.Ct. 1195 (1966) 5

Dugan v. United States, 341 F.2d (7th Cir. 1965) 6

Estes v. United States, 335 F.2d 609, 618 (5th Cir. 1964) 10

Evans v. United States, 284 F.2d 393 (6th Cir. 1960) 10

Fillippon v. Albion Vein Slate Co., 250 U.S. 76 (1919) 8

Fina v. United States, 46 F.2d 643, 644 (10th Cir. 1931) 10, 11

Hoffman v. United States, 341 U.S. 479, 486 (1951) 6

Jenkins v. United States, 380 U.S. 445 (1965) 12

CASES	PAGE
Jones v. United States, 299 F.2d 661, 662 (10th Cir. 1962)	10
Kotteakos v. United States, 328 U.S. 750, 763 (1946)	11
Lewis v. United States, 348 U.S. 419 (1955)	5, 6, 8
Little v. United States, 73 F.2d 861, 865-867 (10th Cir. 1934)	10, 12
Mattox v. United States, 146 U.S. 140 (1892)	8, 10
Mullin v. United States, 356 F.2d 368 (D.C. Cir. 1966)	11
Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964)	7
Ray v. United States, 114 F.2d 508, 513 (8th Cir. 1940)	10
Rice v. United States, 356 F.2d 709, 715, 718 (8th Cir. 1966)	10
Russell v. United States, 306 F.2d 402, 410 (9th Cir. 1962)	6, 7
Shields v. United States, 273 U.S. 583 (1927)	8, 9
United States v. Compagna, 146 F.2d 524, 528 (2d Cir. 1944)	10
United States v. Kahriger, 345 U.S. 22 (1953)	5, 6, 7
United States v. Sullivan, 274 U.S. 259 (1927)	6
United States v. Woodner, 317 F.2d 649, 651 (2d Cir. 1963)	9, 10
United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964)	6
Walker v. United States, 322 F.2d 434, 436 (D.C. Cir. 1963)	10
Wheaton v. United States, 133 F.2d 522, 527 (8th Cir. 1943)	10, 12

Statutes and Miscellaneous.

STATUTES	PAGE
18 U.S.C. § 371	3
18 U.S.C. § 1952	6
26 U.S.C. § 4401	2, 3, 5
26 U.S.C. § 4401 (c)	6
26 U.S.C. § 4411	3, 5, 6
26 U.S.C. § 4422	7
26 U.S.C. § 5841	6
28 U.S.C. § 1254(1)	2

MISCELLANEOUS	
Fed. R. Crim. Proc. 43	8
Fed. R. Crim. Proc. 51	9
National Firearms Act	6
18 Pa.St. §§ 4601, 4603	6
Treas. Reg. § 446011(a)-1(a)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. ....

ANTHONY M. GROSSO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 25, 1966.

CITATIONS TO OPINIONS BELOW

The district court's opinions denying a motion to suppress evidence (79a*) and a motion to dismiss the indictment (97a) are reported at 225 F. Supp. 161. No issue is raised here with regard to suppression of evi-

*This and similar references are to the Appendix printed for use of the court below, and made a part of the record here.

dence. The opinion on the motion to dismiss the indictment is printed in Appendix B hereto, at p. 17 below. The opinion of the court of appeals, printed in Appendix B hereto, at p. 51 below, is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1966. A timely petition for rehearing was denied on May 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the excise tax on wagering imposed by 26 U.S.C. § 4401 violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment?

2. Can a criminal conviction stand where there were communications between the court and the jury during the jury deliberations in the absence of petitioner and his counsel and there has been no showing that these communications were not prejudicial to the petitioner?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are printed in Appendix A, at p. 14 below.

STATEMENT OF CASE

Petitioner was tried by a jury and convicted on fifteen counts involving failure to pay the excise tax on wagers required by 26 U.S.C. § 4401, on four counts of failure to pay the occupational tax on wagering required by 26 U.S.C. § 4411, and on one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. He was fined $191,000—$1,000 on the conspiracy count and $10,000 on each of the wagering tax counts—and sentenced to one year in jail on each count, with the sentence on nine of the counts to be consecutive, and the sentences on the remaining counts concurrent with one of these nine. (386a) His motion to dismiss the excise tax and conspiracy counts of the indictment on the ground that payment in the required manner of the wagering excise tax called for by 26 U.S.C. § 4401 would violate his privilege against self-incrimination (29a) was denied. (99a) This constitutional objection was preserved at the trial (167a-171a) and raised again by motions for judgment of acquittal at the close of the government's evidence (236a-329a) again at the close of all the testimony (T. 2219) and after verdict. (371a-373a)

The issues in this case were submitted to the jury at 4:15 p.m. on Wednesday, March 4, 1964. (381a) The jury deliberated until about 11:00 p.m. that night, and resumed deliberation the following morning. (381a) At 12:15 that afternoon counsel for petitioner was informed by the United States Attorney that at approximately 11:30 a.m. the jury had sent a note to the judge indicating they could not agree, and the court had instructed the jury, through the bailiff, to continue deliberating. (381a) Neither petitioner nor his lawyer were present

when the note was received and the instruction given, and neither the note nor the court's reply were given to the clerk or otherwise made a matter of record. (365a; 381a-382a) The jury continued to deliberate until about 11:00 p.m. that night. (324a)

As the jury was preparing to return to its hotel on that Thursday night, one of the jurors became ill. (324a) Because of her illness the jury was confined to the hotel, and did not resume deliberations until 2:50 p.m. on Saturday, March 7. (383a) Shortly before 3:15 p.m. the jury sent another note saying that they were deadlocked without hope and felt it useless to deliberate any further. (345a) This note was received by the court during a conference at which petitioner and his counsel were present. (346a) Counsel renewed earlier motions (322a; 337a) for a mis-trial (346a), but the court instead said to the bailiff: "Tell them I have got their message and I suggest they keep on working." (346a) At 8:20 p.m. Saturday the jury returned the verdict in the case. (347a) The communication between court and jury was assigned as a ground for a new trial in a motion filed on Tuesday, March 10. (376a) The motion for a new trial was denied. (369a) Appeal was taken and the conviction was affirmed by the court of appeals.

REASONS FOR GRANTING THE WRIT

1. *The self-incrimination issue raised in Question One is an important question of constitutional law which has never been decided by this Court.* This Court has twice held, in *United States v. Kahriger,* 345 U.S. 22 (1953), and in *Lewis v. United States,* 348 U.S. 419 (1955), that the $50 occupational tax on wagering, imposed by what is now 26 U.S.C. § 4411, is constitutional, as against objection based on the privilege against self-incrimination. Whether those decisions can stand in the light of the unanimous decision in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), is itself an important question which the Court has recently agreed to review. *Costello v. United States,* 86 S. Ct. 1195 (1966). This case differs in an important aspect from *Kahriger, Lewis,* and *Costello* because here the challenge is to the constitutionality of the 10% excise tax on wagers, imposed by 26 U.S.C. § 4401, while only the occupational tax was involved in the three cases named. The basis of decision in *Kahriger* was that the privilege of self-incrimination "has relation only to past acts, not to future acts that may or may not be committed." 345 U.S. at 32. By the occupational tax provisions, the Court there held, "appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." *Id.* at 32-33. Again in *Lewis* the occupational tax was said to be "a registration fee that must be paid before engaging in the business of wagering." 348 U.S. at 422.

But this feature, which was thought to save the occupational tax, is of no help with regard to the excise

tax. The excise tax is payable only on wagers which have, in the month covered by the return, actually been placed with the taxpayer. 26 U.S.C. § 4401(c); Treas. Reg. § 44.6011(a)-1(a). Payment of the excise tax is an admission by the taxpayer that he has engaged in the past month in wagering. Such an admission is "a link in the chain," *Hoffman v. United States,* 341 U.S. 479, 486 (1951), and a robust one, of the evidence needed to prosecute the taxpayer for both federal and state crimes. Payment of the excise tax would amount to a confession that the taxpayer has engaged in the business of wagering, though he has not paid the occupational tax required by 26 U.S.C. § 4411, and would incriminate him of failure to pay the occupational tax. It might well also incriminate him under the racketeering statute, 18 U.S.C. § 1952. Cf. *United States v. Zizzo,* 338 F.2d 577 (7th Cir. 1964). Payment of the excise tax would incriminate the taxpayer for violation of the Pennsylvania statutes against lotteries and gambling. 18 Pa. St. §§ 4601, 4603.

The distinction between past conduct and future conduct was relied on by the Ninth and Seventh Circuits to distinguish *Kahriger* and *Lewis,* and to hold unconstitutional 26 U.S.C. § 5841, which requires registration of firearms obtained without complying with other provisions of the National Firearms Act. *Russell v. United States,* 306 F.2d 402, 410 (9th Cir. 1962); *Dugan v. United States,* 341 F.2d 85 (7th Cir. 1965). That same distinction applies here. Because of that distinction, this is a different case from *Kahriger, Lewis,* and *Costello,* and it is more difficult case in which to sustain the law against Fifth Amendment Challenge.

Nor is this case controlled by *United States v. Sullivan,* 274 U.S. 259 (1927). What the Court said in distin-

guishing *Sullivan* in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 79 (1965), is apposite here: "In Sullivan the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." Further Sullivan could have reported his income, but claimed his privilege with regard to its source. Petitioner could not have paid the excise tax without admitting a violation of federal and state law. See *Russell v. United States,* 306 F.2d 402, 409 (9th Cir. 1962).

To hold that a person may not be required to incriminate himself by payment of the excise tax would not have a destructive effect on the fisc. If Congress is really interested in the revenues produced by the taxes on wagering—and it is on this basis alone that it has power to impose these levies, as *Kahriger* holds—it has ample power to provide immunity for taxpayers. *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52 (1964). It has chosen, instead, expressly to deny any immunity to persons paying these taxes. 26 U.S.C. § 4422. If the result, then, is that the constitutional privilege makes the tax unenforceable except where gambling is not unlawful, the fault lies not with the Constitution but with Congress.

The constitutional issue posed by Question One is important and difficult. It has never been decided by this

Court. Though it is related to the issue raised in *Costello,* it is not the same issue, and it would be quite possible to find the excise tax provision here in question unconstitutional though the occupational tax involved in *Costello* be upheld.

2. *The decision below on the jury-trial issue raised by Question Two conflicts with decisions of this Court* and of other courts of appeals. It is settled law that no communication may take place between the court and the jury in the absence of the defendant. *Mattox v. United States,* 146 U.S. 140 (1892); *Lewis v. United States,* 146 U.S. 370 (1892); *Fillippon v. Albion Vein Slate Co.,* 250 U.S. 76 (1919); *Shields v. United States,* 273 U.S. 583 (1927); Fed. R. Crim. Proc. 43. In the present case a criminal conviction has been allowed to stand by the court below although the trial court received a communication from the jury, the exact contents of which are unknown, in the absence of both petitioner and his counsel, and the bailiff, on instructions from the court, gave the jury a message from the court, the contents of which are entirely unknown, in the absence of both petitioner and his counsel. The court below, in reaching this remarkable result, did not dispute the principle of law stated at the outset of this paragraph. Indeed it twice referred to the conduct of the trial court in this respect as "obvious error." Nevertheless it found that such error did not require reversal "in the absence of prejudice to the substantial rights of the appellant." Since "the evidence as to the appellant's guilt was overwhelming and * * * there was no reasonable likelihood that the judge's instruction to the jury influenced the verdict, "reversal was held not warranted. In so ruling, the court of appeals committed "obvious error."

The court of appeals appears to rest its holding in part on the failure of petitioner to object to the communication between court and jury. But petitioner and his counsel did not know of the communication until after it was over, and the damage fully done. The first case which the court below cites as to the requirement of an objection, *United States v. Woodner,* 317 F.2d 649, 651 (2d Cir. 1963), says objections "must ordinarily be raised while there is still time to rectify the asserted error." Similarly Rule 51 of the Rules of Criminal Procedure, though ordinarily calling for objection "at the time the ruling or order of the court is made or sought," goes on to say that "if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him."

The case cannot turn on the absence of an objection which would have served no useful purpose. The real issue is in what circumstances communications with the jury in the absence of a defendant require reversal. A few cases seem to regard this as so serious a deviation from constitutional norms as to require reversal in every case without any showing of prejudice. In *Shields v. United States,* 273 U.S. 583 (1927), this Court reversed where there had been an exchange of notes, the contents of which were a matter of record, without any mention of whether defendant was prejudiced, and expressly refrained from passing on another ground of error asserted by the defendant that the judge's note in reply was in error. The Third Circuit itself, in a civil case, *Arrington v. Robertson,* 114 F.2d 821, 823 (3d Cir. 1940), said, through Marris, J., that for the judge to send written instructions to the jury in the absence of defendant or his counsel "was the denial of a right so fundamental

as necessarily to affect the substantial rights of the defendant regardless of the nature or propriety of the instruction given." See also *Evans v. United States,* 284 F.2d 393 (6th Cir. 1960), where there was reversal though on the facts defendant could not possibly have been prejudiced and his attorney said affirmatively he was satisfied with what the court had done.

At the other extreme would be a rule that communications outside the presence of the defendant require reversal only if defendant can demonstrate prejudice. This seems to have been the view of the court below. It may well be the rule applied in *United States v. Woodner,* 317 F.2d 649, 652 (2d Cir. 1963). If so, the *Woodner* case stood alone, prior to the present decision.

The rule adopted in the vast majority of cases takes a middle position. It provides that there must be reversal unless it affirmatively appears in the record that there was no reasonable possibility of prejudice to the defendant. *Mattox v. United States,* 146 U.S. 140, 150 (1892); *Walker v. United States,* 322 F.2d 434, 436 (D.C. Cir. 1963); *United States v. Compagna,* 146 F.2d 524, 528 (2d Cir. 1944); *Estes v. United States,* 335 F.2d 609, 618 (5th Cir. 1964); *Rice v. United States,* 356 F.2d 709 (8th Cir. 1966); *Wheaton v. United States,* 133 F.2d 522, 527 (8th Cir. 1943); *Ray v. United States,* 114 F.2d 508, 513 (8th Cir. 1940); *Ah Fook Chang v. United States,* 91 F.2d 805, 810 (9th Cir. 1937); *Jones v. United States,* 299 F.2d 661, 662 (10th Cir. 1962); *Little v. United States,* 73 F.2d 861, 865-867 (10th Cir. 1934); *Fina v. United States,* 46 F.2d 643, 644 (10th Cir. 1931).

By departing from the salutary rule of the cases from this Court and six other circuits last cited, the

court below has diluted the protection which the law has always given criminal defendants. Before sending a man to jail for nine years and fining him $191,000 after a trial in which there was "obvious error" of constitutional dimension, it is not too much to require the government to demonstrate that he has not been harmed by the error. To transfer the burden to defendant, and to require him "to show something as prejudicial on which the record is silent, and defendant had no opportunity to hear, would be requiring of defendant the impossible." *Fina v. United States,* 46 F.2d 643, 644 (10th Cir. 1931).

Nor can it be said that the court below did make an affirmative finding of no prejudice, and that its language was simply unartistic. It found that there was no reasonable likelihood that petitioner was harmed because it deemed the evidence of his guilt to be "overwhelming." But "it is not the appellate court's function to determine guilt or innocence." *Kotteakos v. United States,* 328 U.S. 750, 763 (1946). Plainly the evidence did not seem so overwhelming to the jury, which twice reported its inability to agree on a verdict. On this record, neither the court below nor any other can possibly say whether the private communications were prejudicial, because no one knows what they were. It was the recollection of the trial court that the note it received from the jury in the absence of defendant "was at least in substance the same" (365a) as the second note, which is a matter of record. (345a) But the notes may well have been the same in substance, while differing in such a detail as, for example, indicating the numerical division of the jury. See *Mullin v. United States,* 356 F.2d 368 (D.C. Cir. 1966). Presumably, as reported to defense counsel by the United States Attorney, the court, on receipt of the

first note, instructed the bailiff to tell the jury to continue deliberating. But the record is completely silent as to what the bailiff told the jury. "The jury received an instruction second hand, and not by the judge. Chances for error are too great." *Ah Fook Chang v. United States,* 91 F.2d 805, 810 (9th Cir. 1937). For all the record shows, or any party to this litigation knows, the bailiff may have given the jury his own version of the *Allen* charge. He may have told the jury, "You have got to reach a decision in this case." Cf. *Jenkins v. United States,* 380 U.S. 445 (1965). These are not imaginary horribles. See *Wheaton v. United States,* 133 F.2d 522 (8th Cir. 1943), where, in response to a note from the jury saying they were hopelessly deadlocked, the judge sent the bailiff back with the message he would not excuse them, but the bailiff stayed on in the jury room for some time explaining how they could vote separately on different counts. "In the case at bar, the record is silent as to what occurred in the jury room. There is nothing therefore in this record to support a finding, affirmatively made in the cited cases, that the error was necessarily harmless." *Little v. United States,* (10th Cir. 1934).

The rule that all communications between the court and the jury should be in open court, in the presence of the defendant and his counsel, is no Eighteenth Century strait-jacket. It is a rule of great worth to those charged with crime. Departures from the rule should not be ignored save on the clearest showing that the violation was technical only, and not prejudicial to the defendant. This Court should review this case in order to prevent dilution of that rule.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219
Attorney for Petitioner

CHARLES ALAN WRIGHT
2500 Red River St.
Austin, Texas 78705
Of Counsel

APPENDIX A

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V. No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

United States Constitution, Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Code, title 26, section 4401:

(a) Wagers. There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

United States Code, title 26, section 4422: The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

United States Code, title 26, section 6107: In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for

each 100 words or fraction thereof in the copy or copies so requested may be charged.

Treasury Regulations § 44.6011(a)-1(a): Every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by §§ 44.4403-1 and 44.6001.1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. A return shall be made for each month whether or not liability has been incurred for that month. If the taxpayer ceases operations which make him liable for the tax, the last return shall be marked "Final Return."

Federal Rules of Criminal Procedure, Rule 43: The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. * * *

Federal Rules of Criminal Procedure, Rule 51: Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

Opinion of the District Court on Motion to Dismiss Indictment

WALLACE S. GOURLEY, *Chief Judge.*

This criminal proceeding presents, through a Motion to Suppress Evidence, many of the complex and intricate questions which arise in law enforcement as to the interpretation of the Constitutions of the United States and Pennsylvania as the provisions thereof relate to arrest, search of premises, and seizure of evidence.

The proceeding also brings into clear focus the problems that law enforcement officers have in bringing to the bar of justice those persons who it is believed are the heads or in control of, directly or indirectly, syndicated lottery or gambling operations.

On one side of the scales or account of justice, the ledger entries show the all-consuming amount of time, effort and dedication to duty involved in the close and careful supervision and investigation of a syndicated lottery operation, the lack of legal training and education of the law enforcement officers, and the lack of close or proper liaison relationship between police officers who enforce the law on the one hand, and the directors of said officers or their supervisors and the legal staff commonly identified as the prosecuting attorney or district attorney's office which does not have the time or opportunity to confer and/or consult with an officer before an arrest is made. On the other side of the ledger are the provisions of the Constitutions of our states, more

particularly Pennsylvania in this proceeding, the Constitution of the United States of America, and the requirements which our founding fathers enunciated as to the protection and rights which a resident of this great country should be afforded when accused or required to appear in a Court of the state or the United States to answer charges as to conduct which has been prohibited or made unlawful either by state or federal law.

The Court has reviewed most carefully and meticulously all of the evidence, documentary and oral in nature, has studied and evaluated all authorities cited by the United States of America and the defendants, has made its own independent research, and I must conclude that although the matters involved in the Motion to Suppress are in the "twilight zone" of what is proper or improper, reflected judgment requires the conclusion that the arrests and the evidence secured in the searches and seizures incident to the arrests is, in each instance, sustainable and the Motion to Suppress, in each instance, will be denied.

My mind can reach no other conclusion and I believe if the writers of our Constitution had the facts which exist in this case before them, the Constitution would state that "the provisions of the Constitution shall not be interpreted to mean that the arrests and evidence secured incident thereto are improper or violative of the Constitution which is this day written."

The evidence which is subject to the Motion to Suppress arises out of two raids by state officers, one of which will be identified as the Jefferson Raid, and the other as the Bethel Park Raid. While each raid naturally involves a different factual situation, many of the constitutional and legal questions which are posed have

application to each of the two separate and distinct searches and seizures, the legality of which is now before the Court. However, a legal question is presented in the Bethel Park Raid which is not posed in the Jefferson Raid.

A. *Jefferson Raid—*

Members of the Racket Squad of the City of Pittsburgh had, for some time prior to said raid, been conducting a very extensive and thorough investigation of racket and gambling activity in and around Pittsburgh and Allegheny County, Pennsylvania. On the day of the raid, an experienced member of the Racket Squad, Flynn, who had personally participated in much of the investigation, obtained a search warrant from a Pittsburgh Alderman for the Lovejoy home in Jefferson Borough.

The knowledge which Flynn had as to violations of the state lottery laws, the specific details of the surveillance, and the facts revealed by the surveillance and investigation were stated in the presence of the Alderman while both were participating in a conference in the office of the Director of Public Safety, an official by whom the Alderman was employed as Chief Clerk. Later that day, the same officer appeared before the Alderman in his office in the City of Pittsburgh and signed informations, under oath, charging the commission of the crimes of operating a lottery and conspiracy to operate and maintain a lottery. Each of the informations was in conclusionary terms. The wording of each of them was in the language of the state wagering statutes and did not set forth any facts as to what the officer swearing out the information had seen, heard, observed or even been told by others. The only facts given or statements made to the Alderman under oath were those which were

contained within the information itself. Any facts given or statements made orally to the Alderman or in his presence were not made while Officer Flynn or anyone else was under oath.

B. *Bethel Park Raid—*

Search and arrest warrants were issued by a magistrate for the premises raided and for some of the persons arrested therein. The factual background of this raid is similar to that of the Jefferson Borough Raid in that the only statements made or facts given while under oath before the Justice of the Peace who issued the warrants were those contained in the information sworn to by Leo Flynn who, by this time, was a private citizen and no longer a Pittsburgh Police Officer.

The Justice of the Peace was not told, under oath, orally or in writing, any of the facts of gambling activity by the persons present at the raided premises and arrested therein personally known, or of which trustworthy information had been received, by Mr. Flynn or by William Claney Smith, Esq., an Assistant District Attorney for the County of Allegheny who had, by accident, discovered what has been described as the wagering headquarters allegedly being operated by or for some or all of the defendants in this proceeding.[1]

---

1. The evidence of the police officers in this proceeding indicates that the wagering headquarters was moved daily, and that discovery of it, therefore, to a great extent, depended on someone cognizant of the wagering activities and of the people known to be active participants at the higher levels, seeing such a person at a time when the people so involved usually congregate to collect and tabulate the wagers and managing to follow such person to the meeting place.

Appendix B.

To facilitate the obtaining of a full, complete and intelligible understanding of the conclusions reached by the Court as to the complex and interrelated legal and factual issues involved in the proceeding, the Court will first discuss the general principles of the law of searches and seizures, and then, as to each issue raised by the facts, will discuss the factual background and the applicable principles of law.

Of the five primary legal questions posed by the factual background of the raids, four are posed in the Jefferson and the Bethel Park Raids, and the fifth is raised solely by the factual background of the Bethel Park Raid and is not posed in the Jefferson Raid.

GENERAL PRINCIPLES OF LAW

Evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendants' immunity from unreasonable search and seizure under the Fourth Amendment is inadmissible in a federal criminal trial. Elkins v. United States, 364 U. S. 206 (1960). However, federal statutory standards are not applicable unless the search and seizure can be deemed to be a federal or a joint federal and state, rather than a state, search and seizure. See Byars v. United States, 273 U. S. 28 (1927).

While the Fourth Amendment to the Constitution of the United States ordinarily prohibits searches of premises without search warrants, a reasonable search of premises may be conducted without a search warrant where such search is incident to a valid arrest. See Ker v. California, 374 U. S. 23 (1963); United States v. Rabinowitz, 339 U. S. 56 (1950). An arrest warrant is not

necessarily required for a valid arrest to be made. The validity of an arrest without a warrant is determined by state law so long as such state law meets federal constitutional standards. See Ker v. California, supra.

To meet said standards the lawfulness of the arrest without warrant must, in turn, have been based upon probable cause, which exists where the facts and circumstances within the knowledge of the arresting officers and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Ker v. California, supra.

The reasonableness of the resulting search and seizure incident to an arrest lawful under state law is determined by federal constitutional standards.[2]

I. WERE THE WARRANTS ISSUED VALID?

The answer is "no".

Law

Article 1, Section 3, of the Constitution of Pennsylvania provides:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without

---

2. No contention has been raised by defendants that the searches and seizures subsequent to the arrests were unreasonable in that the area of the search and seizure was too extensive under the circumstances. Nevertheless, the Court has thoroughly reviewed the record and is satisfied that the search and seizure in both of the raids was reasonable under all the circumstances.

describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

The Fourth Amendment of the Constitution of the United States[3] provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment has been construed to require that affidavits for the issuance of search and arrest warrants must state sufficient facts to permit the impartial Commissioner or issuing magistrate to determine whether probable cause exists. Nathanson v. United States, 290 U. S. 41 (1933); see Jones v. United States, 362 U. S. 257 (1960); Giordenello v. United States, 357 U. S. 480 (1958).[4] This is true whether the prosecution be a state or federal one.

---

3. Whether the Fourth Amendment is applicable in this proceeding because this is a federal prosecution or because the Fourth Amendment is applicable to the activities of state officers through the Fourteenth Amendment, Mapp v. Ohio, 367 U. S. 643 (1961), or for both reasons, the Court will not attempt to determine, since it is clear that, in either case, the requirements of the Fourth Amendment are applicable to this proceeding and are so conceded to be by both parties.

4. The Supreme Court does not appear to have determined whether the Fourth Amendment requires a written affidavit, under oath. Since, however, no facts

Discussion

It appears to the Court that the facts contained in the sworn written informations[5] upon which the warrants were issued are insufficient to enable a magistrate to find the probable cause prerequisite to issuance of a warrant under the Fourth Amendment. The informations are in conclusionary terms, taken from the language of the Pennsylvania lottery statutes.

Some contention has been made that while the information may be in conclusionary terms, nevertheless the language used also constitutes a statement of facts. Even if this premise be accepted, the statements contained therein do contain sufficient facts to enable a magistrate to find probable cause.[6] See Giordenello v. United

---

were given or statements made, under oath, except those contained in the written information, the Court need not determine that issue in this proceeding.

5. While an affidavit as such was not made out prior to the issuance of the warrants for the raids, the Court sees no reason why the information sworn to in each case by Leo Flynn could not serve as the affidavit on which the issuing magistrate would issue the warrants.

6. Defendants also contend that the warrants in the Jefferson Raid were invalidly issued since they were not issued by a neutral and detached magistrate in that the issuing magistrate was regularly employed as Chief Clerk of the Pittsburgh Department of Public Safety, whose officials sought the warrants for the raid, and the magistrate had been consulted about the raid during the course of his duties at the Department. Since the Court has determined that the informations for both of the raids are insufficient on their face, determination of these contentions of defendants is unnecessary and the Court

States, 357 U. S. 480 (1958); Nathanson v. United States, 290 U. S. 41 (1933); Byars v. United States, 273 U. S. 28 (1927).[7]

Whatever may be the requirements of the Pennsylvania Constitutional provision insofar as requiring that the oath or affirmation be in writing, since in neither of the two raids was anything said under oath other than what was stated in the formal information, any discussion or determination of this question would be superfluous and unnecessary. Furthermore, since it seems quite clear to the Court that the issuance of both the search and arrest warrants did not meet Fourth Amendment standards, the Court will not attempt to determine whether or not Article 1, Section 8, of the Pennsylvania Constitution applies to the issuance of arrest warrants as well as search warrants, a question which appears not to have yet been determined by any Pennsylvania appellate court,[8] nor will the Court measure the sufficiency of the facts stated in the informations against the requirements of the Pennsylvania Constitution for the issuance of a warrant.

---

intends to express no indication of its opinion of this contention.

7. The Fourth Amendment requirement of probable cause, applied in Byars and Nathanson to search warrants, is likewise applicable to arrest warrants. Giordenello v. United States, 357 U. S. 480, 485-86 (1958).

8. A Pennsylvania trial court construed Art. I, § 8, as applicable to arrest warrants as well as to search warrants, and interpreted said provision as requiring a written oath or affirmation. See Kessler v. Hoffman, 9 District 365 (Berks Common Pleas 1899).

Accordingly, the Court holds that the warrants issued for both the Jefferson and the Bethel Park Raids were defective because the sworn informations supporting the issuance of the warrants failed to meet the requirements of the Fourth Amendment in that they did not state sufficient facts to permit a finding by an impartial magistrate that probable cause existed for the issuance of the warrants. Therefore, the search and seizure cannot be justified as being pursuant to a valid search warrant or as incident to an arrest pursuant to a valid arrest warrant.[9]

II. DOES THE INVALIDITY OF THE WARRANTS RENDER THE ENTRY AND SEARCH AND SEIZURE UNLAWFUL, EVEN IF THERE WOULD HAVE BEEN A VALID BASIS FOR ENTRY AND SEARCH AND SEIZURE WITHOUT WARRANT?

The answer is "no".

Discussion

Defendants rely principally on United States v. Merritt, 293 F. 2d 742 (3rd Cir. 1961), wherein entry under authority of a validly issued federal search warrant was held unlawful because not served in the daytime and an attempt to validate the search and seizure as incident to an arrest based on the officers' post-entry observation of defendant committing a felony in their presence failed.

---

9. Some confusion exists as to whether or not an arrest warrant was ever procured for the Jefferson Raid. The Court finds that while the state officers did go to the Lovejoy home in Jefferson Borough intending to arrest as well as to search, they did not procure an arrest warrant.

The Court believes that Merritt is distinguishable from this proceeding on the facts, and that it is not authority for a proposition of law different from that which the Court deems controlling here—the intent of officers to rely on invalid warrants does not defeat the right of the Government to demonstrate that no warrant was necessary in order to make the arrest and the resulting search and seizure. See United States v. Rabinowitz, 339 U. S. 56, 60 (1950) (alternative holding); Stallings v. Splain, 253 U. S. 339 (1920); DiBella v. United States, 284 F. 2d 897 (2d Cir. 1960), vacated, 369 U. S. 121 (1962); Williams v. United States, 273 F. 2d 781 (9th Cir. 1959), cert. denied, 362 U. S. 951 (1960); United States v. Russian, 192 F. Supp. 183 (D. Conn. 1961); Compare Jones v. United States, 357 U. S. 493 (1958); Giordenello v. United States, 357 U. S. 480 (1958).[10]

Nowhere in the Merritt opinion is there any statement or suggestion that if entry was under an invalid warrant, an arrest which could legally be made without a warrant is rendered invalid solely because an attempt was made to enter under a warrant which was later declared invalid.

---

10. The officers must, of course, have entered with an intent to arrest, an intent which they clearly had in both of the raids involved in this proceeding, and the arrest must have either preceded the search or, possibly, have occurred contemporaneously with the search. Since in both of the raids involved in this proceeding the arrests preceded the searches, no problem is presented as to whether a search occurring contemporaneously with the arrest meets the standards of the Fourth Amendment.

Appendix B.

The Government, in Merritt, apparently attempted to justify the search on the theory, *inter alia,* that the officers entered with a view to interrogation and investigation and that an arrest did not occur until after they entered the premises and saw defendant therein committing a felony in their presence. The Government did not attempt to argue that the entry into the premises to arrest was based on probable cause to arrest without a warrant. This question not having been raised in the Court of Appeals[11] and, accordingly, of course, not having been determined, and Merritt, therefore, being distinguishable from this proceeding and not governing the result to be reached,[12] the Court holds that the intent of the officers to rely on warrants which were later declared invalid does not defeat the right of the Government to demonstrate that no warrant was necessary to make the arrest and that the resulting search and seizure was lawful as incident to a lawful arrest.

---

11. An examination of the file in the Merritt case while it was still in the United States District Court for the Western District of Pennsylvania, of the briefs and the transcript of the arguments before the Court, indicates that the government there did not raise the alternative argument which it is raising here.

12. Defendants also rely on Commonwealth v. Troup, 302 Pa. 246 (1931). The arguments pertaining to Merritt are equally applicable to Troup. The Court was not called upon to consider any alternative arguments and did not do so.

III. WERE THE SEARCHES AND SEIZURES LAWFUL AS INCIDENT TO A LAWFUL ARREST WITHOUT WARRANT?

The answer is "yes".

A. *May police officers under the law of Pennsylvania arrest without a warrant for a misdemeanor when said misdemeanor is not committed in their presence?*

The answer is "yes".

Law

The government concedes that under the law of Pennsylvania[13] a peace officer ordinarily may arrest for a misdemeanor without a warrant only when said misdemeanor is committed in his presence.[14] However, the government contends that as to that class of offenses relating to the setting up of gaming devices or machines, the Legislature of Pennsylvania, by statutory enactment, Act of March 31, 1860, P. L. 382, §60, 18 Pa. Stat. Ann. § 1445 (hereinafter sometimes referred to simply as 18 Pa. Stat. Ann. § 1445, § 1445 or 1445) has broadened the power of the peace officers to arrest without a warrant.[15] 18 Pa. Stat. Ann. § 1445 provides, *inter alia*:

---

13. Whether an arrest is valid is governed by state law so long as such law meets federal constitutional standards. See discussion in section entitled "General Principles of Law" *supra*.

14. The record is bare of any evidence that the arresting officers saw a misdemeanor being committed in their presence.

15. The Act of March 31, 1860, P. L. 382, is entitled, "An Act To Consolidate, Revise, and Amend the Penal Laws of this Commonwealth."

"It shall and may be lawful for any sheriff, constable or other officer of justice, with or without warrant, to seize upon, secure and remove any device or machine of any kind, character or description whatsoever, used and employed for the purposes of unlawful gaming as aforesaid, and to arrest, with or without warrant, any person setting up the same."

This statute has been held to apply to the operation of numbers lotteries, Commonwealth ex rel. DiDio v. Baldi, 176 Pa. Super. 119 (1954); Commonwealth v. Bruno, 176 Pa. Super. 115 (1954), and would clearly be applicable to the seizure of the type of numbers paraphernalia involved in this proceeding.[16]

§ 1445 does not purport to indicate that the right to arrest is limited to an offense committed in the view of the officer and the Court does not so read said statutory provision.[17] Accordingly, under Pennsylvania law, by virtue of § 1445, an arrest without warrant of any person operating a numbers lottery is valid even though not committed in the view or presence of the arresting officer, and the arrests in question were certainly arrests for operating a numbers lottery.

---

16. The contention of defendants that § 1445 is inapplicable to the arrests in question in that it is essentially a provision for civil forfeiture proceedings of gambling paraphernalia is without merit.

17. The research of counsel for the parties and the independent research of the Court has revealed no Pennsylvania appellate court cases which have determined this issue. A Pennsylvania trial court has taken a view contrary to that reached by the Court. See Commonwealth v. Battipaglia, 19 Camb. L. J. 30 (Philadelphia Quarter Sessions 1953).

However, defendants contend that § 1445 has been repealed by the Act of June 24, 1939, P. L. 872, § 1201, 18 Pa. Stat. Ann. § 5201 (hereinafter sometimes referred to as § 5201 or 5201), which provides, *inter alia*:[18]

> "The following acts and parts of acts, and their amendments, are hereby repealed absolutely, except insofar as the same * * * (d) relate to search and seizure * * *: * * * The act, approved the thirty-first day of March, one thousand eight hundred sixty (Pamphlet Laws, three hundred eighty-two), entitled "An Act to Consolidate, Revise and Amend the Penal Laws of this Commonwealth."

Since § 1445 is § 60 of said Act, it would ordinarily have been repealed by the enactment of § 5201. However, the government contends that § 1445 has been saved from repeal by the exceptions from repeal contained with § 5201.

The Pennsylvania courts have determined that the search and seizure provisions of § 1445 were not repealed by § 5201. Commonwealth v. Bruno, 176 Pa. Super. 115 (1954); Schuettler v. Maurer, 159 Pa. Super. 110 (1946); Petition of Potter Title and Trust Company, 157 Pa. Super. 254 (1945). Since, however, no Pennsylvania appellate court has specifically decided the question of whether or not § 5201 repealed the arrest provisions of § 1445, the question facing the Court is one of first impression which the Court must decide as it believes the appellate courts of Pennsylvania would decide the issue

18. The Act of June 24, 1939, P. L. 872, § 1201, 18 Pa. Stat. Ann. § 5201, is entitled, "An Act to consolidate, amend and revise the penal laws of the Commonwealth."

were it facing them. See Cerr v. Emrick, 283 F. 2d 293 (3rd Cir. 1960); Eckman v. Baker, 224 F. 2d 954 (3rd Cir. 1955).[19]

In the opinion of the Court, § 5201 did not repeal the arrest provisions of § 1445. As the Court reads § 5201, when it speaks of repealing certain acts, except insofar as the "same relate to search and seizure," "same relate to search and seizure" and only refer to an act or a section or a subsection thereof, whichever may be the applicable unit, as a whole and not to a portion thereof. Search and seizure provisions and the arrest provisions on which the government relies are contained in the same sentence of, obviously, the same section, § 1445.

Based on my legislative experience, having been a member of the Senate of Pennsylvania during the years 1942 through 1945, I cannot conceive that the Legislature of Pennsylvania intended to repeal part of § 1445 while retaining the remaining portions thereof. The Court reads § 5201 as saving all portions of any section which relate to searches and seizures. § 1445 is such a section and accordingly has not been repealed by § 5201.

---

19. The same Pennsylvania trial court which held that the offense must have been committed within the view of the arresting office for an arrest to be legal under § 1445 has also held that § 1445 was not repealed by § 5201. See Commonwealth v. Battipaglia, *supra* note 17.

B. *Does an arrest without a warrant for a misdemeanor not committed in the presence of the arresting officer meet federal constitutional standards?*

The answer is "yes".

Discussion

Defendants contend that to allow an arrest without warrant for a misdemeanor not committed in view of the arresting officer creates doubt as to the constitutionality of § 1445 in that § 1445 would then be legalizing a search and seizure without warrant solely by what the search turns up. This contention is without merit. § 1445 must be read as authorizing an arrest without warrant only when the arrest is based on probable cause to believe that an offense has been or is being committed. When so based on probable cause, the arrest is legal when made and is not legalized, as defendants contend, by what evidence a subsequent search reveals. As so interpreted, 18 Pa. Stat. Ann. § 1445 clearly meets federal constitutional standards.

C. *Was the search and seizure preceded by the arrest and did the arresting officers enter with the purpose of arrest?*

The answer to both questions is "yes".

Discussion

The Court finds as a fact that the arrest in each of the two raids occurred immediately upon the entrance of the officers into the home, the searches and seizures occurred subsequent to the arrests, and the officers entered each of the homes in order to arrest.

D. *Did the arresting officers have probable cause to believe that an offense had been or was being committed?*

The answer is "yes".

Discussion

Since no contention has been made by the defendants in their brief that the arresting officers did not have probable cause to arrest without warrants, a simple finding that the arresting officers did have probable cause might suffice. Nevertheless, the Court will explain the reasons for reaching its determination.

The issue in both raids is complicated by the fact that some of the persons participating in the raid were private citizens and, as such, do not come within the terms of § 1445 which only applies to a "sheriff, constable, or other officers of justice."

(1) Jefferson Raid—

There can be no doubt that Officer Flynn, and probably Officer John James of the Pittsburgh Police Department, each had probable cause to believe that persons within the Lovejoy home in Jefferson Borough, Allegheny County, had committed and were committing an offense. Unfortunately for the government's position, the Lovejoy home was not located in Pittsburgh and, therefore, the participation of each in the raid was as a private citizen and not as an "officer of justice".

However, one participant in the raid does qualify under the terms of § 1445. Allegheny County Detective Botula had jurisdiction to arrest anywhere in Allegheny

County and qualified as an "officer of justice" while arresting in Jefferson Borough.

Allegheny County Detective Botula also had probable cause to arrest. While he knew nothing of the surveillance and the investigation before the day of the raid, prior to entering the home to arrest he had been told by Flynn and James the facts which they themselves knew as the result of the prior surveillance and investigation they and their fellow Pittsburgh Police Officers had conducted of the activities in the Lovejoy home and of the persons arrested therein. This knowledge, coupled with Detective Botula's belief that the Pittsburgh officers were reliable informants and the status of the informants as police officers, certainly constitutes probable cause. Additionally, the activities in the home, after the raiders had knocked,[20] provided some corroboration of the facts which had been told Detective Botula, but even without that, he had probable cause to arrest.

(2) Bethel Park Raid—

Again there can be no question but that Leo Flynn, by this time a private citizen but still retaining his contacts in the Pittsburgh Police Department, and William Claney Smith, Esq., Allegheny County Assistant District Attorney, each had probable cause to arrest. However, as the Court interprets § 1445, neither one qualifies as an "officer of justice," and the arrests can be justified only if Constable Hasley or Deputy Constable Hieroni-

---

20. The occurrences involved in executing the invalid warrants are discussed more fully in Section IV, *infra*, on the legality of the entrance into the home to arrest.

mus, each of whom had jurisdiction to arrest in Bethel Park, had probable cause to arrest without a warrant. The Court finds that each of them had such probable cause. Deputy Constable Hieronimus was present throughout the time Mr. Flynn and Attorney Smith were telling the facts of the past surveillances, of Smith's discovery of the headquarters and of their background knowledge and information to the Justice of the Peace. While the evidence indicates that Constable Hasley was absent for a short time while the facts were being stated to Justice of the Peace Hubbard, the Court, nevertheless, finds that Constable Hasley heard enough of the factual background to have had probable cause to arrest. Furthermore, Flynn gave the two Constables further information while they were driving to the raid in Flynn's car. This factual information, when coupled with Constable Hasley's belief that the informants were reliable and the knowledge of both constables of the status of one as a former police officer and the other as an Assistant District Attorney, certainly constitutes probable cause to arrest for each of the constables. Additionally, the occurrences in the house[21] tend to corroborate the facts given to the constables and reinforce the existence of probable cause on the part of the two constables, although probable cause existed even without these corroborative occurrences.

---

21. These are discussed more fully in the discussion on the method of effectuating the arrests. See Section IV *infra*.

IV. DID THE BREAKING OF THE DOORS OF PRIVATE HOMES VITIATE WHAT WAS OTHERWISE A LAWFUL ARREST?

The answer is "no".

A. *Does breaking doors of a private home in order to arrest without a warrant for a misdemeanor not committed in the presence of the arresting officer in and of itself violate the Fourth Amendment?*
The answer is "no".

Discussion

Defendants rely on two cases in support of their contention that an opposite conclusion is required. Chapman v. United States, 365 U. S. 610 (1961); Nueslein v. District of Columbia, 115 F. 2d 690 (D. C. Cir. 1940). Both cases are distinguishable and reliance on them is misapplied.

B. *Does breaking into a private dwelling to arrest without a warrant for a misdemeanor not committed in the officer's presence violate Pennsylvania law?*

The answer is "no".

Discussion

Since the breaking into the house is part of the arrest process, the effect to be given, in determining the legality of an arrest, to the breaking in is determined by Pennsylvania law so long as Federal Constitutional standards are met.[21] Although some Pennsylvania cases

---

21. See the discussion on the applicability of the state law of arrest in the section of this Opinion entitled "General Principles of Law" *supra*.

on this issue have been cited by both parties, no Pennsylvania appellate court appears to have decided the issue before the Court, and the trial court cases do not indicate any consensus of opinion helpful to the Court in determining the applicable Pennsylvania law.[22] The Court considers the question an open one to be determined in the light of reason, common sense, and any legislative intention evident in § 1445.

Applying these criteria to the issue, the Court can only conclude that an arrest without a warrant subsequent to breaking into a private dwelling in order to arrest a person for operating a numbers lottery, even though the offense is not committed in the officer's presence, is legal and valid. To hold otherwise would be to sanction avoidance of the consequences of § 1445 and the other gambling statutes by the simply device of refusing to answer the door not only when the officers are coming to arrest without a warrant under § 1445, but also when officers come to execute a search or arrest warrant.[23]

The Court cannot believe that the appellate courts of Pennsylvania would sanction such a result and be-

---

22. Commonwealth v. Truitt, 369 Pa. 72 (1951) (concurring opinion) (*dictum*); Commonwealth v. Manduchi, 58 Lancaster L. Rev. 54 (1962) (search warrant); Commonwealth v. Whitebread, 52 Luzerne 81 (1962); Commonwealth v. Krubeck, 8 Dist. 521 (Quarter Sessions, Philadelphia 1899); Commonwealth *ex rel.*, Volpe v. Superintendent of County Prison, 5 Dist. 635 (Quarter Sessions, Philadelphia 1896).

23. So long as arrests are permitted without warrants, no differentiation based on the existence of a warrant would appear to be valid when the question of permitting breaking of doors is the issue.

lieves that they would hold that breaking in to arrest without a warrant a person for operating a numbers lottery is permissible, even though said offense is not committed in the officer's presence.

C. *Did the specific circumstances of the entry into the two homes violate any federal constitutional standards or in any way violate state law?*

The answer is "no".

Facts

(1) The Jefferson Raid—

Pittsburgh Police Officers Flynn and James and Allegheny County Detective Botula, all three in plain clothes, approached the house and went to the door. The outer door which was a storm door with windows in it was locked. The inner door which was made of solid wood was unlocked and partly open. The officers could see inside and could be seen by those inside the house, when those inside and outside were at the proper angle. The arresting officers knocked on the door of the premises. There was scurrying, running, and commotion in the house. Persons inside yelled, "It's the cops." A minute after the knocking, the three officers broke into the home and arrested those within.

(2) Bethel Park Raid—

The raiding party was composed of Constable Hasley, Deputy Constable Hieronimus, former Pittsburgh Police Officer Leo Flynn and Assistant District Attorney Smith. Internal Revenue Agent Madden was also pres-

ent.[24] The party approached the front door. Constable Hasley knocked. They heard noises—rumbling walking and running around, and the moving of different things around. A cry of "It is the cops" was heard. Meanwhile, Flynn and Hasley had gone to the cellar door. Finding it unlocked, they raised the door and entered the garage, going from there into an adjoining basement. While entering into the basement, they announced their status as police officers and their purpose to arrest.

Discussion

In their briefs, defendants do not contend that the specific method and facts of the entry were unreasonable under the circumstances and thus violate state law or federal constitutional standards. Instead, they appear to rely solely on the contention that an officer may not break doors of a private home to arrest for a misdemeanor. Under these circumstances, the Court could well find, and does find, that this defense to the extent raised during the hearing has been abandoned. Nevertheless, the Court will make a specific finding as to the reasonableness and legality of the method of entry, under all the facts and circumstances of this particular case.

Under the circumstances of each of these raids—Jefferson and Bethel Park—the "officers of Justice," under 18 Pa. Stat. Ann. § 1445, and the private persons assisting them had reason to believe that the persons inside knew the identity and purpose of the officers and

---

24. For a fuller discussion of the role played by I. R. S. Agent Madden, see the discussion of the effect of his participation in Section V *infra*.

that if they delayed making their entry the wagering paraphernalia which they clearly had probable cause to believe was inside would be destroyed.

The leading case on the vitiation of an otherwise lawful arrest by the method of entry to arrest is Ker v. California, 374 U. S. 23 (1963), which was a state prosecution wherein the entry having been held legal under the state law by the state courts, the legality of the method of entering the home was then measured by federal constitutional standards of reasonableness.[25] After a meticulous comparison of the facts in this proceeding and the facts in Ker, the Court determines that the method of entry in this proceeding meets the constitutional standards of reasonableness set forth in Ker.

As to the vitiating effects of the method of entry on the legality of the arrest under state law, no cases have been cited to the Court wherein this specific question has been raised. It is the opinion of the Court that, breaking in to arrest without a warrant for operating a numbers lottery being permissible under state law,[26] the courts of Pennsylvania would determine that nothing in the facts of this case would violate Pennsylvania Law and vitiate an otherwise legal arrest.

---

25. Federal constitutional rather than statutory standards are applied in federal prosecutions wherein the evidence was seized by state officers. See Elkins v. United States, 364 U. S. 206 (1960).

26. For the discussion of the applicable Pennsylvania law on this point; see discussion in IV (B) of this Opinion.

V. WAS THE PARTICIPATION OF INTERNAL REVENUE SERVICE AGENT MADDEN IN THE BETHEL PARK RAID SUCH AS TO MAKE FEDERAL STATUTORY AS WELL AS CONSTITUTIONAL STANDARDS APPLICABLE TO SAID RAID?

The answer is "no".

Discussion

Defendants rely on the case of Byars v. United States, 273 U. S. 23 (1927), to support their contention that this raid must be deemed a federal raid and that, therefore, federal statutory standards are applicable. The Court in Byars indicated that mere participation in a state search by a federal officer does not render it a federal undertaking and that whether the participation was sufficient to render the state search a federal one depends upon the peculiar facts of each raid.[27]

A comparison of the factual setting in Byars and in the instant case indicates that the two cases are distinguishable and that Byars is inapplicable to this proceeding. In Byars the federal agent not only entered the premises but actually searched a particular room therein and discovered some evidence. In this proceeding, the federal agent was not invited to attend by Mr. Flynn, a private citizen. Refused permission to participate in the raid by his superiors, federal agent Madden was advised that he could go along on the raid as an observer, which he did.

---

27. No contention has been made, as none could be, that this state raid was being conducted for the federal government by state officers.

Contrary to the situation in Byars, Internal Revenue Service Agent Madden did not enter the premises nor did he participate in the search. However, he did, by his own admission, work as a guard at the rear door, even though he had no authority to do so and did not claim any compensation of the federal government for his activities on that day or for the twenty-two miles recorded on his personal automobile during that time.[28] Under all the facts and circumstances, the Court is of the opinion that the participation of Internal Revenue Service Agent Madden in the Bethel Park Raid did not make the raid a federal, or a joint federal and state raid, but that the raid remained a state raid, and that, therefore, federal statutory standards are inapplicable.

Furthermore, if Byars is read as requiring participation in the search, rather than merely in the raid, by the federal agent in order that the full panoply of federal law be applicable, then this proceeding is clearly distinguishable from Byars on the facts, since there is no doubt in the Court's mind that Agent Madden did not participate in the search.

While the Court does not so read Byars, said case might also be read as making the test of the applicability of the full panoply of federal law to be whether the participation of the agent in the search was under color of his federal office. Even if such were the test, federal statutory law, more particularly 13 U. S. C. A. § 3109, on

---

28. The entry in Agent Madden's diary for that date reads, "Worked with Leo Flynn and W. C. Smith as an observer in raid at Betz, 110 Criss St., Bethel Park. I worked as guard at rear door—did not enter house. 2 hours worked. No compensation time claimed. Mileage of 22 miles not claimed."

which defendants rely, is not applicable in this proceeding. After due consideration of all the facts and circumstances of the raid and of the role of Agent Madden in it, the Court finds as a fact that said agent did not participate in the raid under color of his federal office.

For all of these reasons, the Court concludes that federal statutory standards were not applicable to the raid.

VI. CONCLUSION.

Federal statutory standards being inapplicable to each of the two raids, and the Court concluding that, under state law and federal constitutional law, the searches and seizures in each of the raids were reasonable under all the facts and circumstances and were legal and valid as incident to a lawful arrest based on probable cause, it is the considered opinion of the Court that in regard to the items of evidence described in Paragraphs 3 and 25 of Defendants' Motion for Suppression of Evidence, said Motion should be denied.

Statements of fact and conclusions of law contained within this Opinion are adopted as Findings of Fact and Conclusions of Law.

An appropriate Order is entered.

Appendix B.

ORDER.

NOW, THEREFORE, THIS 9th day of January, 1964, Defendants' Motion for Suppression of Evidence described in Paragraphs 3 and 25 of said Motion will be and hereby is denied.

The within proceeding is fixed for trial to commence February 3, 1964, and no continuances will be granted under any circumstances.

/S/ WALLACE S. GOURLEY, CDJ
Chief Judge

Appendix B.

Opinion on Motion to Dismiss Indictment.

(Filed January 9, 1964.)

In this criminal proceeding, defendants have filed a Motion to Dismiss Indictment, Motion for Suppression of Evidence and Motion for Bill of Particulars Ancillary to Motion to Suppress. By prior Order of Court, by agreement and stipulation of the parties, approved by the Court, and by Opinion and Order entered contemporaneously herewith this Opinion and Order, the Court has disposed of the Motions for Suppression of Evidence and for Bill of Particulars Ancillary to Motion to Suppress. It is the considered opinion of the Court that the Motion to Dismiss Indictment should be denied.

Defendants contend that each count of the indictment should be dismissed on the grounds that evidence which is the basis for the indictment was procured illegally. This contention has no merit. The Court has determined that the evidence described in Paragraphs 1, 3, 10, 15, 20, 21, 23, 24 and 25 of defendants' Motion for Suppression of Evidence was legally seized and defendants have withdrawn said Motion as to those items enumerated in Paragraphs 2, 6, 7, 11, 19 and 22 of said Motion. Certainly, any count of the indictment whose basis was the evidence enumerated in any of said Paragraphs of the Motion for Suppression is not open to attack on the ground of being based on illegally obtained evidence. As to the counts of the indictment based on the evidence enumerated in Paragraphs 4, 5, 8, 9, 12, 13, 14, 16, 17, 18, 26 and 27 of said Motion for Suppression of Evidence, which the government, without conceding such evidence was obtained as a result of an illegal search and seizure, has agreed not to introduce

into evidence, it is the opinion of the Court that basing a count of an indictment on illegally obtained evidence is akin to basing such count on hearsay, which clearly is permissible. See Costello v. United States, 350 U. S. 359 (1956). Therefore, even if the evidence enumerated in Paragraphs 4, 5, 8, 9, 12, 13, 14, 16, 17, 18, 26 and 27 were illegally obtained, a question which the Court expressly does not determine, the use of such illegally obtained evidence is irrelevant where the issue facing the Court is whether a count of an indictment should be dismissed.

Defendants also contend that Counts 1 through 19 should be dismissed on the ground that payment in the required manner of the ten per cent wagering excise tax allegedly due and owing by the defendants named in each of such counts would have entailed a violation of the constitutional privilege against compulsory self-incrimination, in that such payment would have tended to incriminate the defendants under both federal and state statutes.

In the opinion of the Court the legal issues raised by this contention are of no merit, having, in effect, already been determined adversely to defendants' position by the Court of Appeals. See United States v. Joseph, 278 F. 2d 504 (3rd Cir. 1960); cf. Lewis v. United States, 348 U. S. 419 (1955); United States v. Kahringer, 345 U. S. 22 (1953).

Conclusion

Since neither of defendants' arguments for dismissing the indictment is meritorious, the Motion to Dismiss Indictment should be denied.

An appropriate Order is entered.

ORDER.

AND NOW, THEREFORE, THIS 9th day of January, 1964, defendants' Motion to Dismiss Indictment will be and hereby is denied.

/S/ WALLACE S. GOURLEY, CDJ
Chief Judge

cc: Gustave Diamond, Esq.
United States Attorney

James E. McLaughlin, Esq., for Anthony Grosso,
606 Frick Building

Vincent J. Fuller, Esq., for Samuel Grosso,
1000 Hill Building
Washington 6, D. C.

Thomas A. Wadden, Esq., for Jennie Gross and Joseph Pino
1000 Hill Building
Washington 6, D. C.

Judgment of the District Court

The sentence of the Court, imposed 3/9/64, is that the deft. Anthony M. Grosso be imprisoned for one year and pay fine of $1,000.00; that he be further imprisoned until payment of fine as to Ct. 1, Ct. 2: One year and pay fine of $10,000.00 together with costs; stay imprisonment until payment of fine. Imprisonment to run consecutively with sentence imposed at Ct. 1. Ct. 3: One year imprisonment and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run consecutive with sentence imposed at Ct. 2. Ct. 4: One year imprisonment and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 6; One year imprisonment and pay fine of $10,000.00 with costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 7: One year and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run consecutively with sentence imposed at Ct. 3. Ct. 8: One year and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 9: One year and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with imprisonment imposed at Ct. 2. Ct. 10: One year and pay $10,000.00 fine and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 11: One year and pay $10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 12: One

year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 13: One year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 14: One year and pay fine of 10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run consecutively with sentence imposed at Ct. 7. Ct. 15: One year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 16: One year and pay $10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 17: One year and $10,000.00 fine and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed Ct. 2. Ct. 20: One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run consecutively with sentence imposed at Ct. 14. Ct. 21: One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run consecutively with sentence imposed at Ct. 20 Ct. 22: One year, pay $10,000.00 fine and costs; stay imprisoned until paid. Imp. to run consecutively with sent. imposed at Ct. 21. Ct. 23: One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imp. to run consecutively with sentence imposed at Ct. 22.

Total imprisonment is nine (9) years and the total fine is $191,000.00 (Foley, J.).

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14810

UNITED STATES OF AMERICA,
Appellee,
v.
ANTHONY M. GROSSO,
Appellant.

APPEAL FROM THE JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 20, 1965

Before McLAUGHLIN, STALEY and SMITH, *Circuit Judges.*

Opinion of the Court

(Filed March 25, 1966)

By SMITH, *Circuit Judge.*

The appellant was tried by a jury and convicted on twenty counts of an indictment charging violations of the Gambling Tax Act of 1954 as amended, 26 U.S.C.A., §§ 4401 and 4411, and related provisions of § 7203 of the same title. On each of said counts he was fined $10,000 and sentenced to a term of imprisonment of one year. He was convicted also on a single count charging conspiracy to defraud the United States, 18 U.S.C.A., § 371, and was thereon fined $1,000 and sentenced to a term

of imprisonment of one year. It was ordered that nine terms of imprisonment were to run consecutively and the others were to run concurrently with the term of imprisonment imposed on count 2. The present appeal is from the judgment entered on this verdict.

The appellant raises several questions, the most important of which is the following: whether, in the absence of both defendant and his counsel, and without notice, the substantial rights of the defendant were abridged by the action of the trial judge when, in response to an unrecorded note from the jury, he transmitted his reply, through the bailiff, without recalling the jury to the courtroom. The question is troublesome because of the wholly inadequate and badly confused record from which it is impossible to accurately reconstruct the incidents giving rise to the situation. We should add that the briefs on the question leave much to be desired.

After a trial which consumed more than four weeks, the instant case was submitted to the jury at approximately 4:15 P.M., on Wednesday, March 4, 1964. Thereafter deliberations continued until 11 P.M., when the jurors retired for the night. The following morning, at approximately 11:30 A.M., shortly after deliberations had been resumed, the jury sent a note to the judge purportedly indicating their inability to reach a verdict. Without notice to the appellant or his counsel, and in their absence, the judge instructed the jury, through the medium of the bailiff, to continue its deliberations. There was no record made of either the contents of the note[1]

---

1 The note was lost but it appears from the record that its content was similar to that of a second note, to which reference is made in the body of the opinion.

or the substance of the judge's response. Although informed of the occurrence shortly afterward, counsel for the appellant interposed no objection and failed to request corrective action by the Court.

It was obvious error for the trial judge to instruct the jury, in the absence of the appellant and his counsel, without notice to them. Shields v. United States, 273 U.S. 583, 588 (1927); United States v. Neal, 320 F. 2d 533, 536 (3rd Cir. 1963); Jones v. United States, 308 F. 2d 307, 311 (D.C. Cir. 1962); Evans v. United States, 284 F. 2d 393, 394 (6th Cir. 1960). It was likewise error to convey these instructions to the jury through the medium of the bailiff. Henderson v. United States, 204 F. 2d 126 (6th Cir. 1953); Wheaton v. United States, 133 F. 2d 522, 526 (8th Cir. 1943). These errors do not warrant reversal in the absence of prejudice to the substantial rights of the appellant.

However, if appellant's counsel was of the opinion that the errors were prejudicial it was his obligation to interpose a timely objection and seek corrective action by the Court. United States v. Woodner, 317 F. 2d 649, 651 (2nd Cir. 1963), cert. den. 375 U.S. 903; United States v. Agueci, 310 F. 2d 817, 840 (2nd Cir. 1962), cert. den. 372 U.S. 959; United States v. Williams, 271 F. 2d 434, 437 (7th Cir. 1959), cert. den. 361 U.S. 961. He should have taken this course when he learned of the errors, but failed to do so. A defendant may not sit idly by in the face of obvious error and later take advantage of a situation which by his inaction he has helped to create. United States v. Agueci, *supra*.

Although not required to do so, we are empowered to consider the alleged errors on the merits if they af-

fected the "substantial rights" of the appellant. FED. RULES CR. PROC., rule 52(b), 18 U.S.C.A.; United States v. Provenzano, 334 F. 2d 678, 690 (3rd Cir. 1964), cert. den. 379 U.S. 947; Ramsey v. United States, 332 F.2d 877 (8th Cir. 1964); United States v. Vasen, 222 F. 2d 3, 5, 6 (7th Cir. 1955), cert. den. 350 U.S. 854; United States v. Jones, 204 F. 2d 745, 749 (7th Cir. 1953), cert. den. 346 U.S. 844. The power is discretionary and should be exercised only in those situations in which the failure to do so would result in a manifest miscarriage of justice. *Ibid.* We do not have such a situation in the instant case.

We find upon our review of the record that the evidence as to the appellant's guilt was overwhelming and that therefore there was no reasonable likelihood that the judge's instruction to the jury influenced the verdict. We are of the opinion that under the circumstances reversal on the ground urged is not warranted. Walker v. United States, 322 F. 2d 434, 436 (D.C. Cir. 1953), cert. den. 375 U.S. 976; United States v. Compagna, 146 F.2d 524, 528 (2nd Cir. 1944), cert. den. 324 U.S. 867. The case of United States v. Neal, *supra,* upon which the appellant relies, is distinguishable from the case now before us.

Following the above described incident the jury continued deliberations until 10:50 P.M. Shortly thereafter the bailiff in charge reported to the Court that one of the female jurors had been injured and that another had become ill. We are here concerned only with the ill juror. After she was given medical attention the physician reported to the judge by telephone that she was suffering from a nervous disorder, the exact nature of which is

not disclosed by the record. This information was imparted to defense counsel, who had been summoned to the judge's chambers by a deputy marshal. The physician's report was apparently never reduced to writing; in any event, its content was not made a part of the record. The juror was again examined by the physician on the following morning. It would appear that the results of this examination were reported to the Court but were likewise not incorporated into the record.

Counsel for the parties met with the trial judge in his chambers on the morning of Friday, March 6, 1964, at which time they were informed that the juror was still ill but that the jury would be able to resume deliberations later in the day. Defense counsel objected to the resumption of deliberations and moved for a mistrial and the discharge of the jury. He argued that because of the illness of the juror, further deliberations might result "in some sort of a compromise verdict." The motion was denied and jury deliberations were suspended until the following day.

On the morning of Saturday, March 7, the juror was again examined by the physician, who reported to the deputy marshal that she was still ill. However, the condition of the juror was apparently such that the jury was able to resume deliberations at 2:45 P.M. Shortly thereafter the information which the deputy marshal had received from the physician was transmitted to the trial judge in the presence of counsel. Defense counsel again renewed his motion for a mistrial and the discharge of the jury on the grounds urged earlier. The motion was denied. The trial judge then asked

counsel if they would consider stipulating "that [the] case could continue * * * with a jury of eleven." Defense counsel refused to so stipulate.

While counsel for the respective parties were in conference with the judge in chambers, the judge received a second note from the jury reading as follows:

> "I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request."

Again the trial judge failed to recall the jurors to the courtroom. He stated to counsel: "We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So, I think we will just tell them we got their message and tell them to keep on working." Defense counsel interposed no objection to the proposed action of the trial judge and made no request that the jury be recalled to the courtroom for further instructions. The bailiff was instructed to tell the jurors, "I have got their message and I suggest they keep on working." We assume that this message was conveyed to the jury, which continued its deliberations for approximately five hours. A verdict was returned at 8:30 P.M., and thereafter, at the request of defense counsel, the jurors were polled and each assented to the verdict as reported by the foreman.

When the jury returned its verdict the physician who had examined the ill juror was available in the

courtroom and this was made known to the Court. Defense counsel requested that the physician be permitted to make his report; this occurred at 9:30 P.M. The Court denied the request stating, "I am not going to bring that up here at this time at all." However, it must be noted that on the previous day the trial judge advised defense counsel that in the event of conviction he could offer testimony of the physician in support of a motion for a new trial. This motion was made in due course but neither the report of the physician nor his testimony was offered in support of it. It is reasonable to assume that the failure of defense counsel to produce this evidence was prompted by his deliberate choice.

The appellant challenges the verdict as void on the ground that it was the product of judicial coercion. He argues that under the circumstances of this case the prolonged confinement of the jury, coupled with the illness of the juror constituted duress. We do not agree.

The length of time a jury may be kept together for the purpose of deliberation is a matter within the discretion of the trial judge, and his action in requiring further deliberation after the jury has reported a disagreement does not, without more, constitute coercion. De Vault v. United States, 338 F.2d 179, 182 (10th Cir. 1964); Mills v. Tinsley, 314 F.2d 311, 313 (10th Cir. 1963), cert. den. 374 U.S. 847; United States v. Minieri, 303 F. 2d 550, 556 (2nd Cir. 1962), cert. den. 371 U.S. 847, and the cases therein cited. However, it has been held that such action, when accompanied by other circumstances, may be coercive. See United States v. Pleva, 66 F. 2d 529 (2nd Cir. 1933). The illness of a juror may be regarded as such a circumstance, but only where

it appears from the evidence that the verdict was induced by the juror's condition. *Id.* There is no such evidence in this case.

Against these critical omissions by the appellant stands the fact the jury was polled after it returned its verdict. The object of a jury poll is "to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus to enable the Court and the parties to ascertain with certainty that a unanimous verdict has in fact been reached and that *no juror has been coerced or induced to agree to a verdict* to which he has not fully assented." *Miranda v. United States*, 255 F. 2d 9, 16 (1st Cir. 1958). (Emphasis added). *Humphries v. District of Columbia*, 174 U.S. 190, 194. Since each of the jurors assented to the verdict as reported by the foreman the verdict should not be set aside in the absence of some proof that coercion in fact existed. Contrary to the appellant's contention, the facts of the case do not speak for themselves.

There are several other questions raised on this appeal. These questions relate to: the admission of certain exhibits allegedly procured as a result of illegal searches and seizures; the denial of a motion to dismiss the indictment made prior to trial; the legality of the sentences; and, the constitutionality of § 4401 of Title 26 U.S.C.A. It is necessary that these questions be treated separately.

ADMISSION OF TESTIMONY

The exhibits in question were seized in searches conducted at various places at different times. Prior to trial these exhibits were made the subject of a motion

to suppress evidence filed by the appellant and three other defendants under rule 41(e) of Fed. Rules Cr. Proc., 18 U.S.C.A. This motion was denied, United States v. Grosso, 225 F. Supp. 161. A separate trial was granted the appellant on his motion for a severance filed under rule 14 of Fed. Rules Cr. Proc., 18 U.S.C.A. The arguments of the defendant relating to the admissibility of the exhibits will be separately discussed.

A

It appears from the testimony of one Hannan, corroborated by his wife, that he was engaged in the operation of a numbers lottery and, between August of 1957 and April of 1961, was operating under an agreement to "lay off" his daily wagers with the appellant in return for a commission and a share of the profits. The relationship of the defendant to Hannan was that of a "banker." On April 27, 1960, special agents of the Internal Revenue Service, armed with a search warrant, raided the Hannan home, where they seized a notebook containing a daily record of Hannan's business and his transactions with the appellant. This notebook was a significant item of proof in the government's case.

At the trial Hannan was called as a witness and he testified at length as to the nature and extent of his daily business with appellant. During his testimony the notebook was produced, identified by him as his personal record, and offered in evidence. The appellant interposed no objection to the testimony which preceded the offer but objected to the admission of the notebook on the ground that its seizure was illegal. The arguments advanced in support of the objection were confusing and

difficult to follow. The objection was overruled and the exhibit was received.

The appellant here contends that: the search warrent was void; it was unlawfully executed; and, the special agent lacked authority to execute it. We find it unnecessary to consider these contentions, here raised for the first time.

It clearly appears from the undisputed evidence in the record that the premises searched were owned and occupied by Hannan and that the notebook seized was a personal record kept by him in the operation of his illegal business. The person against whom the search was directed was Hannan. There is nothing in the record to show that the appellant had the requisite legal interest in either the premises or the notebook and at no time did he claim such an interest. The appellant, relying on Jones v. United States, 362 U.S. 257 (1960), maintains that he was not required to establish such an interest as a condition precedent to his right to challenge the constitutionality of the search and seizure. This reliance is misplaced and demonstrates the penchant of defense counsel for misreading cases.

The defendant in the Jones case was tried and convicted on each of two counts of an indictment charging violations of federal narcotics laws. The first count charged him with having "purchased, sold, dispensed and distributed" narcotics in violation of 26 U.S.C.A. § 4704(a). The second count charged him with having "facilitated the concealment and sale of" narcotics, knowing the same to have been imported illegally, in violation of 21 U.S.C.A., § 174. In a prosecution under either of these statutes the conviction of the accused

may rest solely on proof of possession. It is obvious that in such a prosecution an accused may not assert a a possessory interest in the property seized without admitting his guilt.

The Court held that under such circumstances a defendant may raise the constitutional question without alleging or establishing, as a condition precedent, the requisite legal interest in the premises searched or the property seized. See Contreras v. United States, 291 F. 2d 63 (9th Cir. 1961). The Court held further that an accused is a "person aggrieved by an unlawful search and seizure" within the meaning of rule 41(e), *supra*, if his conviction on the criminal charge made against him may be based solely upon proof of possession.

The appellant's interpretation of the *Jones* decision, if adopted, would completely vitiate the requirement of "standing." This was clearly not the intention of the Supreme Court. The Court held, consistently with earlier decisions, at page 261: "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, *as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.*" (Emphasis supplied). The Court then stated, "Ordinarily, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

As we interpret the decision, the Court confirmed the general rule but created an exception applicable only in a limited class of cases, those cases in which an accused has a choice of asserting an interest in the property, thus admitting guilt, or foregoing his right to challenge the constitutionality of the search and seizure. We are of the opinion, and so hold, that the facts in the instant case do not bring it within the exception. See United States v. Konigsberg, 336 F. 2d 844, 847 (3rd Cir. 1964), cert. den. sub nom. 379 U.S. 930. The appellant herein was tried and convicted of a number of offenses, none of which involved the element of possession.

We have considered the other grounds urged in support of the defendant's claim to standing but find them equally without merit.

B

In the search of the premises of one Lovejoy, located in Bethel Park, Mt. Lebanon Township, local police officials seized "two black books" which apparently contained some evidence as to the operations of a numbers lottery. The circumstances under which the search and seizure were made are set out in detail in the opinion of the District Court, *supra*. On the motion to suppress the evidence it was contended that the search and seizure violated the constitutional rights of the defendants, including those of the appellant. The contention was dismissed as without merit. The appellant here argues that the decision of the court below was erroneous. We do not agree. However, we find it unnecessary to consider the constitutional issue because of the circumstances under which the evidence was offered and received at the trial.

Prior to trial the district attorney represented to the Court that the evidence seized in the search of the Lovejoy premises would not be offered. The evidence was not offered in the government's direct case. The appellant took the stand in his own defense and, under examination by his counsel, not only denied his complicity in the offenses with which he was charged but also testified affirmatively that he had in no way been connected with the operations of a numbers lottery since late in 1950. He further testified that since that time he had been engaged in nothing but legitimate business enterprises.

In rebuttal the government introduced the testimony of a local police official who indentified the books as having been seized in the search of the Lovejoy premises. He testified as to efforts made by the appellant to obtain possession of the books by bribery. The evidence, including the books, was offered for the limited purpose of refuting the appellant's sweeping claim that he had not been engaged in the numbers lottery since 1950. The jury was carefully and properly so instructed.

The appellant argues here, as he did in the court below, that receipt of the evidence was precluded by the government's pretrial representation that it would not be used. We cannot agree. Any advantage that the appellant could have derived from the representation was waived when he testified, under direct examination by his own counsel, that he had not been engaged in the numbers lottery since late in 1950. Under the circumstances the government was not required to stand idly by and let the testimony go unchallenged. The case of Walder v. United States, 347 U.S. 62 (1954), although factually distinguishable, clearly supports this result.

In the *Walder* case it was stated at page 65:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. . . .
>
> "Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the *sweeping claim that he had never dealt in or possessed any narcotics.* Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." (Emphasis supplied).

C

A search of the premises of one Betts, located in Jefferson Borough, resulted in the seizure of certain evidence, the nature of which is not disclosed. The appellant concedes that this evidence was neither offered nor received at the trial but contends only that it was improperly used in the computation of his tax liability for cer-

tain periods covered by the respective counts of the indictment. We find nothing in the record to support the contention that the evidence was so used; in fact, the undisputed testimony is clearly to the contrary. Therefore we find it unnecessary to consider the appellant's attack on the constitutionality of the search.

D

During an investigation of gambling in the area of Pittsburgh, local police officials obtained information that the Calvary Cemetery was being used as a "numbers drop," an exchange point at which lottery wagers were delivered surreptitiously to the representatives of the "bank." On November 27, 1959, while the cemetery was under surveillance, the police observed one Petraglia arrive on the scene in a blue Chevrolet. Shortly thereafter other vehicles arrived and their occupants[2] were observed depositing envelopes and brown paper bags in the Petraglia car. The police knew from experience and their earlier investigation that this was a customary method of delivery employed by numbers operators. They moved in, arrested Petraglia, immediately searched his car and found the envelopes and bags containing thousands of lottery slips. The arrest and search were made without a warrant.

It clearly appears from the undisputed evidence, which we find unnecessary to summarize, that the police had reasonable grounds and probable cause to believe that Petraglia and others they observed on the scene

2. As a result of earlier investigations these persons were known to the police as "runners" or numbers operators.

were engaged in the operation of a lottery in violation of Pennsylvania law. This seems to be conceded by the defendant. However, he argues that the absence of a warrant rendered unlawful the arrest and the search which followed. We cannot agree. The urgency of the situation which confronted the police was sufficient to excuse their failure to obtain a warrant. Draper v. United States, 358 U.S. 307 (1959); United States v. Rabinowitz, 339 U.S. 56 (1950). Petraglia was in a moving vehicle apparently ready to flee as the police approached; in fact, his flight and that of one Berkowitz, who was in another car, was prevented when the police blocked the roadway with their vehicles. The case of McDonald v. United States, 335 U.S. 451 (1948), on which the defendant relies, is distinguishable on it facts and therefore inapposite.

Assuming the illegality of the search, we find the appellant lacked the standing to challenge it. Jones v. United States, supra; United States v. Konigsberg, supra. In his pretrial motion to suppress the evidence he neither alleged nor established the requisite interest in either the automobile searched or the property seized. At the trial of the action the appellant was in no better position to object to the admission of the evidence.

DENIAL OF MOTION TO DISMISS INDICTMENT

Pursuant to rule 12(b)(2) of the Fed. Rules Cr. Proc., 18 U.S.C.A., the appellant moved for dismissal of the indictment on the ground that it was predicated at least in part on illegally seized evidence. The denial of this motion is urged as a ground for reversal. It is well established that an indictment is not open to challenge on the ground that the evidence presented to the grand

jury was either inadequate or incompetent. Lawn v. United States, 355 U.S. 339, 349, 350 (1958); Costello v. United States, 350 U.S. 359, 363, 364 (1956); United States v. Labate, 270 F.2d 122 (3rd Cir. 1959), cert. den. 361 U.S. 900; Coppedge v. United States, 311 F. 2d 128, 132 (D.C. Cir. 1962), reversed on other grounds 369 U.S. 438; United States v. Aviles, 274 F. 2d 179, 191 (2nd Cir. 1960).

ALLEGED ILLEGALITY OF SENTENCES

The appellant contends that the trial judge erred in imposing a separate sentence on each of fifteen counts charging him with the failure to pay the excise taxes due for specified monthly periods. This contention was held by this Court to be without merit in the case of United States v. Minker, 312 F. 2d 632, 636 (1962), cert. den. 372 U.S. 953, which is not mentioned in either brief.

CONSTITUTIONALITY OF STATUTE

The appellant challenges the constitutionality of § 4401 of Title 26 U.S.C.A., under which a tax is imposed on wagers as defined in § 4421 of the same title. He argues that the requirement that he file a tax return stating the gross amount of the wagers received violates his constitutional privilege against self-incrimination. This argument is predicated on an alleged possibility of exposure to prosecution under local law. We have found no regulation under which such returns may be made available to local police and there is no evidence in the record that they are. The only public record available for inspection is an alphabetical list of the names of all persons who have paid special taxes under the Gambling Tax Act, *supra*. 26 U.S.C.A. § 6107.

Appendix B.

A constitutional issue similar to that raised here was considered and decided by the Supreme Court in Lewis v. United States, 348 U.S. 419, 422 (1955). The issue was disposed of on the following basis:

> "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, as in this case, he cannot be compelled to testify and may claim his privilege. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax."

This rationale is applicable here. See United States v. Costello, 352 F. 2d 848, 851 (2nd Cir. 1965).

The imposition of a tax on wagers was a valid exercise of the federal taxing power. United States v. Kahriger, 345 U.S. 22, 31, 32 (1953); see also Lewis v. United States, *supra*. When the appellant voluntarily elected to engage in the business of accepting wagers he was required to pay the occupational tax imposed by § 4411 and the excise taxes imposed by § 4401. The requirement that he file a return was intimately related to the collection of the latter taxes and is therefore supportable as a proper enforcement measure. Under the

rationale of the Lewis case, the possibility "of incrimination for future or even past acts, however great, is irrelevant . . ." United States v. Costello, *supra.*

If, as the appellant now contends, the form of return would call for the disclosure of potentially incriminatory information, the objection should have been raised in the return. See United States v. Sullivan, 274 U.S. 259, 263 (1927). The appellant may not refuse to pay the excise taxes lawfully due and then claim immunity from prosecution for this refusal on the ground that the requirement of a return per se violates his privilege. *Id.* at 264. Since he failed to file the returns "it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for." United States v. Kahriger, *supra;* Lewis v. United States, *supra,* at 33.

An argument similar to the one made here was advanced in United States v. Joseph, 278 F. 2d 504 (3rd Cir. 1960), cert. den. 364 U.S. 823, and was therein held to be without merit.

The judgment of the court below will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B.

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,810

UNITED STATES OF AMERICA
v.
ANTHONY M. GROSSO, SAMUEL J. GROSSO,
JENNIE B. GROSSO, JOSEPH PINO
ANTHONY M. GROSSO, Appellant

(D.C. Criminal No. 62-281)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, STALEY and SMITH, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 10, 1964, be, and the same is hereby affirmed.

ATTEST:
IDA O. CRESKOFF
Clerk

March 25, 1966

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,810

UNITED STATES OF AMERICA, Appellee,

v.

ANTHONY M. GROSSO, Appellant

Sur Petition for Rehearing

Present: STALEY, Chief Judge, MCLAUGHLIN, KALODNER, HASTIE GANEY, SMITH and FREEDMAN*, *Circuit Judges.*

The petition for rehearing filed by ANTHONY *M.* GROSSO in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,
WILLIAM F. SMITH
Judge

Dated: May 3, 1966

*Judge Freedman would grant rehearing.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 181

ANTHONY M. GROSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B 51–69) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1966. A petition for rehearing was denied on May 3, 1966. The petition for a writ of certiorari was filed on May 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory obligation imposed by 26 U.S.C. 4401 to pay an excise tax on wagers violates

the taxpayer's constitutional privilege against self-incrimination.

2. Whether the trial judge's instruction to the jury to keep deliberating, transmitted through the bailiff in the absence of the parties, required reversal of petitioner's conviction.

STATEMENT

Petitioner was convicted after a trial by jury, in the United States District Court for the Western District of Pennsylvania, on fifteen counts charging the failure to pay the excise tax on wagers in violation of 26 U.S.C. 4401, on four counts charging the failure to pay the occupational tax in violation of 26 U.S.C. 4411, and on one count of conspiracy to commit the foregoing substantive offenses in violation of 18 U.S.C. 371. He was sentenced to imprisonment for a total of nine years, and was fined $191,000 (R. 385a–386a).[1] The court of appeals unanimously affirmed.

The evidence, which is not here in issue, disclosed that petitioner was the head of a large-scale "numbers" lottery operating throughout the Pittsburgh area. The operation did as much as $250,000 a week in business (R. 284b–285b). Although petitioner was aware of the requirements of the wagering tax laws (R. 269b–270b), he had never filed an occupational tax return or an excise tax return (R. 276b–277b, 279b–282b). His unpaid tax liability was at least $30,000.

[1] "R." refers to the printed appendices filed in the court of appeals. Page numbers with the suffix "a" denote the appellant's appendix; page numbers with the suffix "b" denote the appellee's appendix.

Trial of the case lasted for more than five weeks. On Wednesday, March 4, 1964, at approximately 4:15 p.m., the case was submitted to the jury. The jury deliberated until 11 p.m. The next morning, deliberations resumed, they continued until approximately 11:30 a.m., at which time the jurors sent the trial judge a note indicating that they were unable to agree on a verdict. The judge, through the bailiff, told the jury to continue its deliberations and immediately directed that counsel be informed of the note and his response. Within forty-five minutes the matter was reported to petitioner's counsel (R. 323a, 381a–382a). Counsel did not object to the procedure and made no attempt to preserve the jury's note or to ascertain the exact wording of the response. The jury continued its deliberations until 11 o'clock that night (R. 324a).

Shortly, thereafter, one of the jurors became ill and was afforded medical attention (R. 325a). The next morning the examining doctor informed the court that the juror would be able to resume work after a few hours rest. At a conference with the trial judge, petitioner's attorney moved for a mistrial and for the discharge of the jury on the ground that, because of the illness of the juror, further deliberations might result "in some sort of a compromise verdict" (R. 322a–323a). The motion was denied, and jury deliberations were suspended until the following day. At 2:50 p.m., Saturday, March 7, the jury met to resume its consideration of the case. Twenty-five minutes later, the bailiff handed the trial judge a note, interrupting a conference with counsel at which petition-

er's attorney had unsuccessfully renewed his motion for a mistrial based on the illness of the juror (R. 337a–339a). The following colloquy ensued (R. 345a–346a):

> The COURT. This is a statement addressed to me: "I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request."
>
> We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So, I think we will just tell them we got their message and tell them to keep on working.
>
> Are there any further suggestions from anyone?
>
> Mr. MCLAUGHLIN [counsel for petitioner]. Well, we have all ready [*sic*] moved for a mistrial.
>
> The COURT. Tell them I have got their message and I suggest they keep on working.
>
> The BAILIFF. All right.

Petitioner's attorney thereupon resumed the interrupted discussion with the judge concerning the advisability of having the jury deliberate on Sunday (R. 346a). At approximately 8:30 that evening, the jury returned its verdict (R. 347a–349a). A poll confirmed that each juror assented to the verdict announced by the foreman (R. 349a–351a). The communication between the judge and the jury was first

objected to in petitioner's motion for a new trial, filed three days after the jury's verdict (R. 376a).

ARGUMENT

1. Petitioner's principal claim is that his conviction raises constitutional issues similar to those presented in *Costello* v. *United States,* No. 41, this Term, certiorari granted, 383 U.S. 942, and that this case should, therefore, be argued together with *Costello* (Pet. 5–8). The contention is unsound, however, because the offenses of which petitioner was convicted involved a failure *to pay* taxes, not, as did *Costello,* a failure *to register.* This distinction is crucial because it is only the compulsory registration which presents the self-incrimination issue decided by this Court in *United States* v. *Kahriger,* 345 U.S. 22, and in *Lewis* v. *United States,* 348 U.S. 419, and again presented for consideration in *Costello.* This Court has consistently sustained the legal obligation to pay taxes on income derived from unlawful sources notwithstanding the danger that, in making such a payment, the taxpayer might be supplying information which could be used in a prosecution against him. *United States* v. *Sanchez,* 340 U.S. 42 (marihuana); *United States* v. *Doremus,* 249 U.S. 86 (narcotics); *Souzinsky* v. *United States,* 300 U.S. 506 (firearms); *License Tax Cases,* 5 Wall. 462 (lotteries). If petitioner's claim were sound, taxpayers receiving income from unlawful sources would be privileged not to pay taxes on the ground that the disclosure resulting from a payment would be self-incriminatory. Compare, *e.g., James* v. *United States,* 366 U.S. 213; *Rutkin* v. *United States,* 343 U.S. 130.

Petitioner's real constitutional objection is not to the obligation that he pay the excise tax but to the requirement that he file a return. He was not, however, accused or convicted of the separate offense (see 26 U.S.C. 7203) of failing to file a return. Consequently, even if this Court were to decide in *Costello* that compulsory disclosure such as that involved in registration or in the filing of a return may, with regard to wagering, be protected by the Fifth Amendment, that would not excuse petitioner's offense of failing to *pay* the tax. Nor is petitioner afforded any additional basis for a constitutional challenge by the assertion that in paying the excise tax petitioner might disclose that he had failed to pay the occupational tax on wagering. A defendant may plainly not excuse a failure to comply with one legal obligation by asserting that compliance would disclose an earlier similar failure. On the same argument a taxpayer who failed to file an income tax return in one year might claim a privilege against ever filing thereafter.

2. The trial judge's reply to the jury's notes was not reversible error. The jury had five weeks of testimony and over 100 exhibits to review and to weigh in assessing petitioner's guilt or innocence on the 21 charged offenses (R. 328a). When the first note was sent, the jury had been deliberating less than nine hours. Thus, the judge's direction that they continue their deliberations—a matter within the sound discretion of the trial court—was plainly appropriate, and petitioner does not claim otherwise. Petitioner alleges only that in the transmission of the oral message through the bailiff it might have been garbled

or embellished and that prejudice must be presumed since the record does not show exactly how the message was repeated.[2]

While prejudice may be presumed where an unrecorded or an erroneous instruction on a substantive matter is privately communicated to a jury, the instruction here—to continue deliberations—was on a matter of procedure and was clearly appropriate in the form it was given to the bailiff. The record refutes petitioner's suggestion that it might have undergone a metamorphosis before being repeated to the jury. If, as petitioner suggests, the message given might have been understood as requiring deliberation until agreement was reached, it is unlikely that after another ten hours of consideration the jury would have found any purpose in again announcing its lack of agreement. Moreover, it is apparent that the first order to continue deliberating—the one attacked by petitioner—did not in fact occasion any agreement.

In any event, petitioner's counsel was informed of the note and response within 45 minutes of its delivery, but he entered no objection to the procedure, made no motion for a mistrial, and gave no indication that he wished to learn the exact terms used by the bailiff in repeating the judge's reply. Had he objected, the bailiff could have been examined immediately to secure his recollection while the matter was fresh. Moreover, the judge could have recalled the jurors and replied to their note in open court, ad-

[2] Petitioner questions the contents of the first note (Pet. 11), but the trial judge announced that it "stated that the jury could not agree. That is all they said" (R. 365a).

monishing them to disregard any previous reply communicated by the bailiff. Not only did petitioner's counsel fail to object and to afford the judge an opportunity to correct any possibility of error, but he tacitly sanctioned the identical procedure when it took place in his presence on the second occasion. Here "defense counsel had known of the incident * * * while [the jury] was deliberating, but had nevertheless stood mute, gambling on an acquittal while holding this issue in reserve." *United States* v. *Gersh,* 328 F. 2d 460, 463 (C.A. 2), certiorari denied *sub nom. Mugnola* v. *United States,* 377 U.S. 992. Under the circumstances, and absent any real probability of prejudice, petitioner should not be permitted to profit from his deliberate silence. *United States* v. *Gersh, supra; United States* v. *Woodner,* 317 F. 2d 649, 651 (C.A. 2), certiorari denied, 375 U.S. 903.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

JULY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

SUPREME COURT, U. S.

AUG 18 1967

JOHN F. DAVIS, CLERK

NO. 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER ON REARGUMENT

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

Attorneys for Petitioner

SMITH BROS. CO. INC., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

PAGE

Statement 1

Summary of Argument 3

Argument:

I. The "Required Records" Doctrine Is Not Relevant to the Obligation to Pay the Wagering Excise Tax 5

II. The Obligation to Pay the Wagering Excise Tax Is Conditioned Upon the Filing of Form 730 21

Conclusion 26

TABLE OF CITATIONS

CASES

Albertson v. Subversive Activities Control Board, 382 U.S. 70 ..... 3, 8, 13, 14, 16, 23

Cephus v. United States, 324 F.2d 893 (D.C.Cir. 1963) 25

Clancy v. United States, 365 U.S. 312 (1961) 12

Combs v. Snyder, 101 F.Supp. 531 (D.D.C. 1951), affirmed 342 U.S. 939 (1952) 23

Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961) 13

Costello v. United States, No. 41, O. T. 1966 5

Curcio v. United States, 354 U.S. 118 (1957) 14

Kansas City v. Lee, 414 S.W.2d 251 (Mo. 1967) 11

Marchetti v. United States, No. 38, O. T. 1966 5

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) 15

Russell v. United States, 306 F.2d 402 (9th Cir. 1962) 13, 16

Table of Citations.

CASES	PAGE
Shapiro v. United States, 335 U.S. 1 (1948)	1, 5, 6, 7, 9, 10, 11, 13, 14, 15, 16, 20
Spevack v. Klein, 385 U.S. 511 (1967)	10
United States v. Ansani, 138 F.Supp. 451 (N.D.Ill. 1956)	8, 9, 11
United States v. Clancy, 276 F.2d 617 (7th Cir. 1960)	12
United States v. Kahriger, 345 U.S. 22 (1953)	18
United States v. Kahriger, 210 F.2d 565 (3d Cir. 1954)	23
United States v. Mungiole, 233 F.2d 204 (3d Cir. 1956)	23
United States v. Murdock, 290 U.S. 389 (1933)	23
United States v. Remolif, 227 F.Supp. 420 (D.Nev. 1964)	12
United States v. Sullivan, 274 U.S. 259 (1927)	8
United States v. Whiting, 311 F.2d 191 (4th Cir. 1962)	23
United States v. Willis, 145 F.Supp. 365 (M.D.Ga. 1955)	12
Wilson v. United States, 221 U.S. 361 (1911)	6

PAGE

STATUTES AND REGULATIONS

15 U.S.C. § 1173 8
18 U.S.C. § 1952 20
26 U.S.C. § 4401 ..... 2, 7, 13, 21, 22, 25
26 U.S.C. § 4403 12
26 U.S.C. § 4411 23
26 U.S.C. § 4423 12
26 U.S.C. § 5841 13
26 U.S.C. § 6001 ..... 4, 12, 22
26 US.C. § 6011 ..... 2, 4, 7, 22
26 U.S.C. § 6107 18
26 U.S.C. § 7203 23
Act of Oct. 18, 1962, Pub.L. 87-840, § 5, 76 Stat. 1075 9
Compulsory Testimony Act of February 11, 1893 ... 6
Emergency Price Control Act 6, 13, 16
Maximum Price Regulation 426, § 14 6
Treas. Reg. 44.4403-1 ..... 12, 22
Treas. Reg. 44.6001-1 ..... 12, 22
Treas. Reg. 44.6011 (a)-1 ..... 4, 7, 22

PAGE

MISCELLANEOUS

Blake, Self-Incrimination, Registration Statutes, and George Washington's Cherry Tree. 23 L. in Trans. 197 19

Brief for the United States, Clancy v. United States, No. 88, O.T. 1960 12

Comment, Self-Incrimination and Registration Statutes: A Case Against Constitutionality, 4 Houston L.Rev. 507 (1966) 15

Brief for the United States, Costello v. United States, No. 41, O. T. 1966 5

Comment, Self-Incrimination and the Federal Excise Tax on Wagering, 76 Yale L.J. 839 (1967) 19, 20

McCormick, Evidence (1954) 10, 16

Mansfield, The Albertson Case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information, 1966 Sup.Ct.Rev. 103 ..... 9, 14, 19

Meltzer, Required Records, The McCarran Act, and the Privilege against Self-Incrimination, 18 U.Chi.L.Rev. 687 (1951) 10, 11, 17

Note, Required Information and the Privilege against Self-Incrimination, 65 Col.L.Rev. 681 (1965) 17

S. 677, 90th Cong., 1st Sess. 20

The Supreme Court, 1965 Term, 80 Harv.L.Rev. 91 (1966) 14

NO. 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER ON REARGUMENT

STATEMENT

This case, then numbered 181, O. T. 1966, was argued on January 18, 1967. On June 12, 1967, the Court ordered the case restored to the docket for reargument at the 1967 Term, 387 U.S. . . . ., and requested counsel to discuss, in their briefs and oral arguments, the following questions:

(1) What relevance, if any, has the required records doctrine, Shapiro v. United States, 335 U.S. 1, to the validity under the Fifth Amendment of the

obligation to pay the wagering excise tax imposed by 26 U.S.C. § 4401?

(2) Is satisfaction of an obligation to pay a wagering excise tax imposed by 26 U.S.C. § 4401 conditioned upon the filing of a return required under 26 U.S.C. § 6011 and pertinent regulations? If it is not, what information, if any, must accompany the payment of a wagering excise tax obligation in order to extinguish the taxpayer's liability for that obligation?

The present brief is limited to the two questions thus specified in the Court's order. We refer the Court to our brief filed last term for discussion of the other aspects of the case.

SUMMARY OF ARGUMENT

I. The "required records" doctrine would be relevant in this case only if it means that the privilege against self-incrimination is inapplicable whenever the law requires a writing to be kept or made. Such a rule would destroy the privilege. This Court, lower courts, and commentators have all recognized that the doctrine cannot be that sweeping, although the limitations on the doctrine are not yet clearly formulated. Any of the possible limits on the "required records" doctrine would put this case beyond that doctrine.

The limitation most clearly supported by authority and reason is between records, required to be maintained and subject to inspection, and reports, which must be filed with the government. To make a person come forward on his own initiative and file incriminating reports is indistinguishable from compelling him to make oral disclosures on the witness stand. There is a less drastic inroad on the policies of the privilege if he is merely required to permit the government, on its initiative, to inspect pre-existing records he has kept.

It is possible also to draw a distinction in terms of whether the records required relate to acts and activities that are normally lawful or normally criminal. Such a distinction between "an essentially noncriminal and regulatory area of inquiry" and "an inquiry in an area permeated with criminal statutes" is stated in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 79 (1965), and may explain why the Court there held invalid a registration requirement without making any reference to the "required records" doctrine. Alterna-

tively it may be held that the doctrine applies only if the dominant purpose of the record requirement is something other than the detection and prosecution of crime.

In the present case the person subject to the law is required to come forward and file reports of his activity in an area permeated with criminal statutes by a statute principally intended to aid the detection and prosecution of crime. By any test the "required records" doctrine cannot defeat the constitutional privilege here.

II. The statutes and Treasury Regulations, 26 U.S.C. §§ 6001, 6011(a), Treas. Reg. § 44.6011(a)-1, explicitly require every person liable for the excise tax on wagers to make a return on Form 730. Even if an administrative practice of accepting payment without filing of the form would be permissible in the face of those statutes and regulations, there is no indication that any such practice exists. The testimony of the government witnesses in this case clearly presupposed that the excise tax can be paid only by filing a Form 730, and the only evidence that petitioner did not pay the tax is that he did not file such a form. It thus appears that satisfaction of the obligation to pay the wagering excise tax is conditioned upon the filing of the return required by the statute and regulations.

ARGUMENT

I. The "Required Records" Doctrine Is Not Relevant to the Obligation to Pay the Wagering Excise Tax

When this case came to the Court last term, it was set down for argument with *Costello v. United States*, No. 41, O. T. 1966.[1] In its brief in the *Costello* case, at page 25 n. 24, the United States said:

> We have not discussed, and there is no need for the Court presently to consider, any possible relationship between the privilege against self-incrimination and the so-called "required records" doctrine, see *Shapiro v. United States*, 335 U.S. 1. No such issue is involved on the facts of this case.

Since there is no apparent distinction between the excise tax, involved in this case, and the occupational tax, involved in *Costello*, insofar as the "required records" doctrine is concerned, petitioner regarded this concession by the United States as applicable to both cases, and neither petitioner nor the United States made any reference to the "required records" doctrine in their briefs in the present case at the 1966 Term. We were fortified in doing this by the fact that the statement of the United States in the *Costello* brief appeared to us clearly right. In response to the first question posed by the Court in its order of June 12th, we spell out the reasons for this conclusion.

---

1. Costello died in December, 1966. On January 9, 1967, the Court granted certiorari in *Marchetti v. United States*, No. 38, O. T. 1966, renumbered No. 2, O. T. 1967, and set it for argument in place of the *Costello* case. The government's brief in *Costello* served as its brief in *Marchetti*.

Argument.

The leading case of *Shapiro v. United States,* 335 U. S. 1 (1948), involved conviction of a dealer for having made tie-in sales in violation of regulations under the Emergency Price Control Act. The conviction was challenged on the ground that § 202(g) of that Act, incorporating by reference the immunity provisions of the Compulsory Testimony Act of February 11, 1893, gave defendant immunity since he had produced records about the transactions in question in response to a subpoena issued by the Price Administrator under the authority of the Act. A bare majority of this Court rejected that contention. The Court first held that the immunity provisions applied only if a person had been compelled to produce information as to which the privilege against self-incrimination would otherwise be available It then adopted a dictum from *Wilson v. United States,* 221 U.S. 361, 380 (1911), that some records required by law to be kept can no longer be regarded as merely private papers, and that the privilege of the Fifth Amendment does not apply to them. The records produced by Shapiro were within a regulation adopted under the Emergency Price Control Act requiring a dealer to keep "records of the same kind as he has customarily kept" relating to the prices he charged. Maximum Price Regulation 426, § 14, 8 Fed. Reg. 9546 (1943). The Court then concluded that such records fitted the "required records" concept of the *Wilson* case.

> In the case at bar, it cannot be doubted that the sales record which petitioner was required to keep as a licensee under the Price Control Act has "public aspects." Nor can there be any doubt that when it was obtained by the Administrator through the use of a subpoena, as authorized specifically by

> § 202(b) of the statute, it was "legally obtained" and hence "available as evidence." The record involved in the case at bar was a sales record required to be maintained under an appropriate regulation, its relevance to the lawful purpose of the Admintrator is unquestioned, and the transaction which it recorded was one in which the petitioner could lawfully engage solely by virtue of the license granted to him under the statute.

335 U.S. at 34-35.

For the *Shapiro* doctrine to have relevance here, the following line of reasoning would be necessary. Statutes and regulations require the payment of an excise tax on wagers and the filing of a return showing the amount of wagers received. 26 U.S.C. §§ 4401, 6011; Treas. Reg. § 44.6011(a)-1(a). Such a return, if made, would have "public aspects" and would be a "required record." Therefore the privilege against self-incrimination does not apply to such a return, and a person liable for the tax cannot refrain from filing the return and paying the tax on the ground that to do so would make him a witness against himself in a criminal proceeding.

We accept for present purposes the *Shapiro* result, although the dissents in that case show how much was to be said for a contrary view, even on those facts. Neither authority nor reason, however, support the sweeping extension of *Shapiro* that would be required to make it relevant here.

If the privilege against self-incrimination has no application to an excise tax return, because such a return is required by law, then the same conclusion would be in order for an income tax return. To reach that con-

clusion would require rejecting the considered dictum of *United States v. Sullivan,* 274 U.S. 259, 263 (1927), that an income taxpayer may claim the privilege on his return if the form of return provided calls for answers that he is privileged from making. Similarly, if the "required records" doctrine is applicable here, then the wrong result was reached in the recent and unanimous decision in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), for there would be at least as much force in regarding the registration of Communists involved in that case as a "required record" as there would be in so regarding an excise tax return.

The case closest on its facts to the present case is *United States v. Ansani,* 138 F. Supp. 451 (N.D. Ill. 1956). There the court held unconstitutional so much of 15 U.S.C. § 1173, as it then stood, as required manufacturers of or dealers in gambling devices to file monthly records of all sales and deliveries of gambling devices. The court said, at 453-454:

> The required reports here are personal reports in every sense of the term—they are not public records, outside the protection of the Constitution, as was the case in Shapiro v. United States * * *. A dealer in gambling devices, a natural person entitled to the personal guarantees in our Bill of Rights, is compelled by a penal statute to report his unlawful acts. To say that these required reports become public documents is to erase the Fifth Amendment from the Constitution.

It is interesting, in light of the distinction we suggest below, that Congress subsequently amended the statute in question. The amended statute requires records to

be kept, and makes them subject to inspection, but eliminates the requirement that the person involved file them with the Attorney General. Act of Oct. 18, 1962, Pub.L. 87-840, § 5, 76 Stat. 1075.

The court was right in *Ansani* in saying that a contrary result would erase the Fifth Amendment from the Constitution. For the *Shapiro* principle to apply in this case, or in *Ansani,* it would be necessary to read *Shapiro* as holding that the privilege against self-incrimination is inapplicable to any writing required by law to be kept or made. There might still be some vague and undefined due process limitation on the power of government to require a particular kind of record, but the privilege against self-incrimination itself would no longer have any effect. "The notion that because a disclosure is required the privilege does not apply, if extended to its full logical reach, is capable of entirely destroying the privilege." Mansfield, *The Albertson Case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information,* 1966 Sup. Ct. Rev. 103, 148-149.

Though lower courts and commentators have had difficulty in determining the precise proposition for which *Shapiro* stands, they have recognized that the doctrine announced there is limited, and is not to be carried to its full logical reach. In *Shapiro* itself this Court assumed that "there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself." 335 U.S. at 332. Only last Term, in *Spevack*

v. Klein, 385 U.S. 511, 518-519 (1967), the plurality opinion stated that the lawyer involved had been denied an opportunity to make a record that the documents demanded by subpoena there — some, at least, of which were clearly required to be kept by local rule — "had no 'public aspects' within the required records rule but were private papers." See also 385 U.S. at 520 (Fortas, J., concurring). The clear implication is that not every record required by law to be kept has "public aspects" so as to bring it within the *Shapiro* rule.

Two commentators who think well of the "required records" doctrine recognize that there are limits on it. Dean McCormick says:

> Doubtless the records and reports requirement must be directed toward some class of acts and activities that would normally be lawful rather than criminal. A requirement that every person who kills another with firearms should report the fact to the sheriff would presumably fall afoul of the privilege.

McCormick, Evidence 283 (1954). Professor Meltzer puts a somewhat different example:

> Suppose, e.g., the federal government in order to enforce the Mann Act required the keeping of records of all interstate excursions involving women. Would that requirement be valid? One can fit the statute under the standard announced by the Chief Justice in the Shapiro case, but it obviously has a different flavor from statutes requiring records as an incident of a comprehensive regulatory program. It is not easy, however, to say precisely what the difference is. Perhaps it is that the sole or the

> dominating purpose of the hypothetical record requirement appears to be to compel criminals to keep incriminating records to be used to convict the record-keepers in subsequent criminal trials. Where this appears to be the dominant purpose, a compelling argument may be made that the statutory requirement would appear to be invalid under the Fifth Amendment or, at least, ineffective to destroy the privilege.

Meltzer, *Required Records, The McCarran Act, and the Privilege against Self-Incrimination,* 18 U.Chi.L.Rev. 687, 714-715 (1951). See also *United States v. Ansani,* 138 F.Supp. 451, 454 (N.D. Ill. 1956), where it is said that a statute requiring all burglars to file monthly reports of burglaries perpetrated and an inventory of all stolen goods would be repugnant to the Fifth Amendment.[2]

The problem is not whether there are limits to the *Shapiro* rule — on that all are agreed — but what those limits are. Courts and commentators have suggested a variety of possible limits. We submit that whatever limit is appropriate, this case is beyond it. We shall discuss the various possibilities, but consider first the distinction between this case and *Shapiro* that to us seems best supported by reason and authority and most clearly decisive of this issue in the present case.

---

2. The analogy to a tax on proceeds of burglaries was much discussed at the first argument of this case. See *Kansas City v. Lee,* 414 S.W.2d 251 (Mo. 1967), where the court, upholding an ordinance making it a crime to possess a wagering tax stamp with the intent to engage in gambling, found the ordinance indistinguishable from statutes making it unlawful to possess burglary tools.

Argument.

The distinction we here urge is between reports and registration statements, which must be filed with the government, and records, which must be maintained and may be subject to inspection by the government. There are provisions in the statutes and regulations dealing with the wagering excise tax requiring the keeping of records. 26 U.S.C. §§ 4403, 4423, 6001(a); Treas. Reg. §§ 44.4403-1, 44.6001-1. In the present case there is no issue before this Court as to records of that type. Petitioner is not charged with failure to keep such records nor with refusal to permit inspection of them. There is division of opinion whether even that kind of record is within the "required records" doctrine. Compare *United States v. Remolif*, 227 F.Supp. 420, 423 (D. Nev. 1964) (doctrine not applicable), with *United States v. Willis*, 145 F.Supp. 365, 368-369 (M.D. Ga. 1955) (doctrine applicable). The only appellate decision in point we have found is *United States v. Clancy*, 276 F.2d 617, 629-631 (7th Cir. 1960), where the Seventh Circuit held that the "required records" doctrine applied to records of wagers required to be kept by 26 U.S.C. §§ 4403, 4423, and 6001. The force of that decision is lessened by the fact that it was reversed here, albeit on another ground, *Clancy v. United States*, 365 U.S. 312 (1961), and even more by the fact that when the case reached this Court the Solicitor General expressly disclaimed reliance upon the ruling of the court of appeals that the records involved were not private papers within the Fourth and Fifth Amendments. Brief for the United States, *Clancy v. United States*, No. 88, O. T. 1960, p. 37 n. 14.

Whatever may be the ruling with regard to the records required by § 4403 and the other provisions of

the Code and regulations, the situation is far different with regard to the return that must be filed for payment of the tax under § 4401. As Justice Douglas observed in his dissent in *Communist Party of the United States v. Subversive Activities Control Board,* 367 U.S. 1, 179-181 (1961): "The compiling, the signing, and the filing of the registration statement required of officers, directors, and others by the registration form is a form of elicited testimony, not the surrender of preexisting records. * * * The cases dealing with the duty to keep records (see Shapiro v. United States, supra) can be put to one side." This, of course, was the result reached by the whole Court when the issue in the *Communist Party* case was decided on the merits in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), and it is worthy of note that in *Albertson* the Court did not feel compelled even to make reference to *Shapiro.*

The distinction suggested is that applied by the Ninth Circuit in *Russell v. United States,* 306 F.2d 402, 410-411 (9th Cir. 1962), involving the registration provision of the National Firearms Act, 26 U.S.C. § 5841:

> *Shapiro v. United States,* 335 U.S. 1, 68 S.Ct. 1375, also relied upon by the Government, involved neither a taxing statute nor a registration provision * * * There is little if any similarity between the provisions of the Emergency Price Control Act, and regulations thereunder, requiring the maintenance and production of certain records, and the section 5841 registration provision. Section 5841 does not pertain to the regular maintenance of records. Rather it requires the furnishing of information concerning past conduct when, and only when, such

past conduct is actually or presumptively unlawful. In the light of subsequent pronouncements by the Supreme Court, we are not disposed to read the opinion in Shapiro any broader than its actual holding, namely that one may be compelled to produce for examination business records required to be kept in due course.

The distinction here suggested is fully consistent with the result in *Shapiro*, since that case involved production under subpoena of records regularly kept. It also seems to be consistent with the observation by the Court in *Shapiro* that "of course all *oral* testimony by individuals can properly be compelled only by exchange of immunity in return for privilege." 335 U.S. at 27 (emphasis by the Court). See also *Curcio v. United States*, 354 U.S. 118 (1957), where the privilege was held applicable to oral testimony under circumstances such that records would not have been privileged. In *Albertson* it was said that " if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." 382 U.S. at 78. *Albertson* has been read as making it clear that the government may not use registration as a device to compel disclosures that would support a claim of privilege on the witness stand. *The Supreme Court, 1965 Term*, 80 Harv.L.Rev. 91, 210 (1966). See also Mansfield, *The Albertson Case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information*, 1966 Sup. Ct. Rev. 103, 135. The registration statement and the tax return, with their questions calling for incriminating answers, seem more akin to testimony on the witness stand than they do to the keeping of routine business records. In our initial brief

we argued that petitioner could not have been required to give oral testimony about the gross amount of wagers accepted by him in a preceding month, and that the privilege should protect him as fully when the government seeks that information on a tax return. (Pet.Br. 8-10). This argument is relevant also in connection with "required records" aspects of the case.

Among the complex of values protected by the privilege against self-incrimination are our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt, our preference for an accusatorial rather than an inquisitorial system of justice, and our sense of fair play, which dictates a fair balance between the state and the individual by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load. *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 55 (1964). See also Comment, *Self-Incrimination and Registration Statutes: A Case Against Constitutionality,* 4 Houston L. Rev. 507 (1966). The limitation on *Shapiro* here urged, that the privilege applies to reports even if not to records, is a minimal safeguard if these values are to be preserved. A record-keeping rule still leaves the burden on the government to take the initiative and to search out the records in the citizen's hands with which it may later make a case against him. This is a less drastic inroad on the policies of the privilege than would be involved if the citizen were required, on pain of criminal penalties, to come forward on his own and give to the government reports showing that he has violated the laws.

Though we think that the distinction between reports and records is entirely consistent with the cases, supported by sound policy, and fully decisive of the present case, there are other possible limitations on the "required records" doctrine that have impressive support and that would be equally decisive. One such limitation is suggested by the distinction drawn in *Albertson* between "an essentially noncriminal and regulatory area of inquiry" and "an inquiry in an area permeated with criminal statutes." 382 U.S. at 79. *Shapiro* is a classic example of the former area. *Shapiro* was a licensee under as complete a regulatory scheme as the nation has known, a scheme justified under the war power and the demands of national emergency. In most instances the production of the records required under the Emergency Price Control Act, though useful to the government for the operation of its regulatory plan, would not incriminate the owner of the records. But to file a document, or produce records, showing one to be a Communist, or a gambler, or a possessor of illegal firearms, or a dealer in gambling devices is a sure invitation to a criminal prosecution, and in most cases would suffice for a conviction. This line of distinction was in Dean McCormick's mind when he made the observation quoted earlier that the "required records" doctrine can only apply to "acts and activities that would normally be lawful rather than criminal." McCormick, Evidence 283 (1954). See also the observation of the Ninth Circuit that the firearms registration provision is unconstitutional because it requires information about past conduct "when, and only when, such past conduct is actually or presumptively unlawful." *Russell v. United States,* 306 F.2d 402, 411 (9th Cir. 1962).

This argument has been put in somewhat different form in a thoughtful recent commentary. Note, *Required Information and the Privilege against Self-Incrimination,* 65 Col.L.Rev. 681 (1965). The conclusion reached there is that disclosure may be required of "information that reflects essentially neutral activity," *id.* at 695, and that "the determining factor is whether the information sought is of such a nature that it would come into independent existence in the absence of government compulsion." *Id.* at 694. Shapiro would have kept records of his business whether the government required such records or not. Indeed the relevant regulation called for "records of the same kind as he has customarily kept." That one is a Communist, or that one has accepted wagers, is the kind of information ordinarily kept as clandestine as possible. On the test proposed by the commentator, as on the more straightforward distinction between those areas essentially noncriminal and those permeated with criminal statutes, the "required records" doctrine would not apply and the privilege would be available in the present case.

Not unrelated to the test just considered is the suggestion that the purpose of the record requirement is the measure of its validity. We have quoted earlier from Professor Meltzer's article where it is suggested that if the dominant purpose of requiring the record is to make it easier to convict criminals, the privilege against self-incrimination applies, but that if the dominant purpose is something other than the detection and prosecution of crime, the records may be used where they do provide evidence of crime. Meltzer, *Required Records, The McCarran Act, and the Privilege against Self-Incrimina-*

tion, 18 U.Chi.L.Rev. 687, 715 (1951). This seems a more doubtful limitation than those that have previously been discussed, for it opens the door for psychoanalyzing Congress or an agency as to the dominant purpose of a particular requirement. In any event, it would not alter the result in the present case. Even if the wagering taxes produce enough revenue to pass muster as a bona fide exercise of the tax power, it can hardly be said that this is their dominant purpose. The express statutory provision making records as to the occupational tax available to state prosecutors, 26 U.S.C. § 6107, the absence of any provision for confidentiality of excise tax returns, and the practice of the Internal Revenue Service in furnishing excise tax returns to aid in criminal prosecutions (Pet.Br. 20-23) all confirm the indications in the legislative history of the law that the dominant congressional motive was "to hinder, if not prevent the type of gambling taxed." *United States v. Kahriger,* 345 U.S. 22, 27 n. 3 (1953). See also the concurring opinion of Justice Jackson in the *Kahriger* case: "This is difficult to regard as a rational or good-faith revenue measure, despite the deference that is due Congress." *Id.* at 35.

Although each of the limits discussed thus far would be enough to make the "required records" doctrine inapplicable in the present case, and there are good reasons for each of them, it is fair to say that neither singly nor together do they provide the full measure of protection that the Fifth Amendment would seem to require. There are stronger arguments for finding the privilege applicable where reports must be filed than where records must be kept—but the fact remains

that Shapiro was coerced to provide evidence that led to his own conviction, a result not easily reconciled with the privilege. To limit the "required records" doctrine to essentially noncriminal areas would prevent the most odious use of the doctrine—but it would be of scant comfort to the person engaged in such an area whose records do reveal that he has committed a crime. Nor would it be much more palatable to convict a person on the basis of a record he has been required to keep because the dominant purpose of requiring the record was some laudable goal other than unearthing criminals. "The Fifth Amendment has no meaning if it does not protect against incriminating questions asked in the pursuit of legitimate public interests." Blake, *Self-Incrimination, Registration Statutes, and George Washington's Cherry Tree,* 23 L. in Trans. 197, 217 (1963).

Two recent commentators have suggested the only solution to this matter that will fully respect the privilege against self-incrimination while giving recognition to the government's need for information. This is to grant immunity if disclosure of information is compelled, at least to the extent of barring use of the information, or the fruits thereof, in a criminal prosecution. Mansfield, *The Albertson Case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information,* 1966 Sup.Ct.Rev. 103, 159-166; Comment, *Self-Incrimination and the Federal Excise Tax on Wagering,* 76 Yale L.J. 839, 845 (1967). This rule would not lead to a different result than those discussed earlier. No such immunity has been granted by statute, and, for reasons we have presented before

(Pet.Br. 25-27), we think it is for Congress rather than this Court to create the immunity.[3]

> In the wagering tax, however, Congress has made a specific decision *not* to provide such immunity. Unless the Court is willing overtly to amend the statute, it must construe the provision of immunity on its face, as did the Albertson court. With such an approach, the tax as written must fall under a self-incrimination claim.

Comment, 76 Yale L.J. 839, 844 (1967) (emphasis in original).

We do not urge on the Court the solution proposed by the commentators just cited. Though it would lead to the same result in this case as the other tests discussed, there is one important difference. The other tests all are limitations on the "required records" doctrine, fully consistent with the result in *Shapiro*. The solution just discussed would have required a different result in *Shapiro*. Since the "required records" doctrine should be held inapplicable in the present case on the narrower grounds presented, decision whether to overrule *Shapiro* can be left to another day when that issue is squarely raised.

---

3. Congress is not slow in providing such immunity if it is needed. See S. 677, 90th Cong., 1st Sess., passed by the Senate on June 13, 1967, providing for immunity if the public interest requires it in the enforcement of the Anti-Racketeering Act, 18 U.S.C. § 1952, and three other statutes.

II. The Obligation to Pay the Wagering Excise Tax Is Conditioned Upon the Filing of Form 730

Petitioner awaits with some interest learning the position of the United States on the second of the questions posed by the Court in the order restoring this case for reargument.

In our original submission we stated briefly the reasons why, in our view, the wagering excise tax can only be paid in connection with filing the required form, Form 730, and further suggested that even on the unrealistic supposition that the Internal Revenue Service would accept payment of the excise tax without requiring a Form 730, it would be necessary for the taxpayer to identify the tender as being the sum due under 26 U.S.C. § 4401. (Pet. Br. 15-17). In its brief the United States limited itself to the following comment:

> We assume, *arguendo,* that the filing of the appropriate return (Form 730, App. B, *infra*) must accompany payment of the excise tax, or that at least some identification of the taxpayer must be provided along with such payment, since a tax measure cannot be effectively administered without obtaining a minimal amount of information from the persons being taxed.

(Govt. Br. 19 n. 14). We understood this to mean that the parties were in agreement on this subsidiary issue. Thus petitioner was surprised when counsel for the United States told the Court at oral argument that a taxpayer could tender a check marked "Miscellaneous Excise Taxes," and that this would be accepted by the Service and constitute a sufficient compliance with § 4401.

Argument.

We submit that the United States was right in the position it took in its brief, and in error in the view it advanced at oral argument.

The statutory scheme is explicit and unambiguous. "Every person liable for any tax imposed by this title, or for the collection thereof, shall * * * make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. * * *" 26 U.S.C. § 6001. The regulations authorized by that section have been made with regard to this particular tax. Treasury Regulation § 44.6011(a)-1 provides, in relevant part: "Every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by §§ 44.4403-1 and 44.6001.1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. * * *." Finally § 6011(a) of the Code states: "When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations." Thus § 6001 says that persons liable for the excise tax on wagers "shall" make such returns as the Secretary prescribes, the regulation prescribes that they "shall" make a return on Form 730, and § 6011(a) provides that they "shall" file Form 730 and include the information required by that form. The conclusion seems inescapable that "nothing in the Act or regulations permits less than literal and full compliance with the requirements

of the form * * *." *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 78 (1965).

The United States is in a better position than is petitioner to advise the Court of any administrative practice permitting payment of the tax without filing the form. The propriety of such an administrative practice, contrary to the command of the statute and regulations, would be doubtful, and indeed would raise questions whether conviction here for "willful" failure to pay the tax, under 26 U.S.C. § 7203, is consistent with the doctrine of *United States v. Murdock,* 290 U.S. 389 (1933). The sources available to petitioner, however, give no indication that there is any such administrative practice. The reported cases demonstrate quite clearly that there is no such practice with regard to the closely related occupational tax on wagers imposed by 26 U.S.C. § 4411. In two cases the United States has stipulated that the Commissioner would not accept payment of the occupational tax unless the taxpayer first furnished the information required on Form 11-C, the form relevant to that tax. *United States v. Kahriger,* 210 F.2d 565, 570 n. 5 (3d Cir. 1954); *United States v. Mungiole,* 233 F.2d 204 (3d Cir. 1956). In two other cases it is stated as a fact that the Commissioner refused applications for a wagering tax stamp because the applicant failed to furnish the required information. *United States v. Whiting,* 311 F.2d 191, 193 (4th Cir. 1962); *Combs v. Snyder,* 101 F.Supp. 531 (D.D.C. 1951), affirmed 342 U.S. 939 (1952).

The testimony in the trial court of witnesses from the Internal Revenue Service gives no indication that they are aware of any administrative practice permit-

ting payment of the tax without filing of the form. The technical advisor to the District Director for the Pittsburgh district, W. Dean Struble, testified that a person operating a lottery in that area would "be required to file his 11-C and his 730 with [his] office" (R. 92). Again he said that "those that are principals are required to file the Form 730" (R. 93). He testified with regard to another taxpayer that there was "no record of the excise tax having been paid" and explained that he meant by that that his search had turned up "no Form 730" (Tr. 960).[4] To the question whether petitioner's brother had paid the excise tax during a particular period, Mr. Struble thought it a sufficient answer to say that "there is no record of a return having been filed * * *" (Tr. 1440). Another government witness, Frederick A. Ruprecht, group supervisor of the wagering and excise division of the Internal Revenue Service for that district, testified that to determine what tax had been paid by petitioner or his associates, he "went through 730's which were filed at that time in this office alphabetically * * *" (Tr. 1484).

Mr. Struble testified directly that if there is no 11-C on file that means that the taxpayer did not pay the special occupational tax for engaging in the business of wagering during that period (R. 98). Though the question was never put in so many words, it is apparent throughout the testimony of Messrs. Struble and Ruprecht that if no Form 730 is on file, it means that the taxpayer did not pay the excise tax on wagering.

---

4. By stipulation of counsel in this Court, either party may refer in its brief and oral argument to any part of the original record not designated for printing.

Indeed if the excise tax may be paid other than in connection with Form 730, petitioner's motion for a verdict of acquittal at the close of the government's case (R. 36) should have been granted. The only evidence of nonpayment of the tax was testimony that there was no Form 730 on file under the name of petitioner (R. 98) and that in computing the alleged tax liability appropriate credit had been given to the principals and partners for any tax returns filed by any of their associates (Tr. 1124, 1484, 1525-1526). There is not a word of evidence in the government's case to show that the tax had not been paid by means other than filing a Form 730.[5]

We submit that the government's proof in this record confirms what the statutes and regulations indicate: the obligation to pay the excise tax imposed by § 4401 is conditioned upon the filing of Form 730.

---

5. Petitioner testified in his own defense. Though he did not say so in terms, a jury could reasonably conclude from his testimony that he did not pay the excise tax, with or without a Form 730. Whether this could cure the defect in the government's proof would raise the question discussed in *Cephus v. United States*, 324 F.2d 893 (D.C. Cir. 1963), but we do not brief that question because it seems to us so clear, for reasons stated above, that the tax cannot be paid without filing Form 730, and thus that proof that no Form 730 had been filed was sufficient proof that the tax had not been paid.

CONCLUSION

For the reasons stated above, and those set forth in our original brief, the judgment below should be reversed, with instructions to dismiss the indictment as to counts 1 to 4 and 6 to 17 and to grant a new trial on counts 20 to 23.

Respectfully submitted,

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

Attorneys for Petitioner

August, 1967

SUPREME COURT, U. S.

FILED

AUG 24 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

1967

12

NO. ~~181~~ OCTOBER TERM, 1966

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

REPLY BRIEF FOR PETITIONER

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219
Attorney for Petitioner

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
of Counsel

SMITH BROS. CO. INC., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

TABLE OF CITATIONS

	PAGE
Costello v. United States, 383 U. S. 942 (1966) 352 F. 2d. 848, 849-50 (2nd Cir. 1965)	1, 2
Lewis v. United States, 348 U. S. 419	1, 2
Mullin v. United States 356 F. 2d 368 (D. C. Cir. 1966)	5
United States v. Kahriger 345 U. S. 22	1
Wheaton v. United States 133 F. 2d 522 (8th Cir. 1943)	5

STATUTES

McCormick Evidence 410 (1954)	4
26 U. S. C. § 3290 (Now § 4411)	1, 2
§ 4412	2

IN THE

Supreme Court of the United States

NO. 181 OCTOBER TERM, 1966

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETIONER

1. Respondent finds a "crucial" distinction, with regard to the privilege against self-incrimination, between a conviction for failure to pay taxes, as in this case, and a conviction for failure to register, as in *Costello v. United States,* certiorari granted 383 U.S. 942 (1966) and suggests that it is "only the compulsory registration which presents the self-incrimination issue" decided in *Kahriger* and *Lewis.* (Res.Br. 5). The cases rebut any such distinction. Kahriger was charged on an information containing two counts, one for failure to pay the occupational tax required by 26 U.S.C. § 3290 (now § 4411), and the other for failure to register as required by 26 U.S.C. § 3291 (now § 4412). Transcript of Record, *United States v. Kahriger,* No. 167, O. T. 1952, p. 2. Costello was charged in two separate indictments. The first indictment charged him and others with conspiring to fail to pay the occupational tax imposed by § 4411. The second indictment contained two counts,

one for failure to pay the tax under §4411 and one for failure to register under § 4412. Costello was convicted on all counts. He received concurrent prison sentences and fines on the conspiracy indictment and the § 4411 count, and a suspended sentence and probation on the § 4412 count. *United States v. Costello,* 352 F. 2d 848, 849-850 (2d Cir. 1965).

If the respondent's suggested distinction were sound, both Kahriger and Costello could have been convicted on the payment count, even if they had a constitutional defense to the registration count. This Court would hardly have granted certiorari in Costello's case on a question about "the federal wagering tax statutes here involved" if the constitutional issue can be raised only with regard to the suspended sentence imposed for failure to register. But the point is put beyond speculation by the *Lewis* case, for there the information contained but a single count, and Lewis was charged only with failure to pay the tax imposed by what is now § 4411. Transcript of Record, *Lewis v. United States,* No. 203, O.T. 1954, p. 1. The self-incrimination issue squarely decided in *Lewis,* and explicitly set for reconsideration in *Costello,* could only be with regard to payment of a tax, not registration.

Nor do the four cases cited by respondent (Res.Br. 5) support the proposition that this Court has consistently sustained taxes on income derived from unlawful sources even though the taxpayer might be supplying information which could be used in a prosecution against him. These cases hold only that unlawful income can be taxed—a proposition not challenged here—and did not involve, as we read them, any issue of self-

incrimination of the sort now tendered. Petitioner concedes the government's right to tax his income from whatever source derived, and to impose excise taxes on particular forms of income. Petitioner claims, however, that if the government wishes to compel him to pay such a tax, when to do so would require him to give testimony against himself in a criminal proceeding, it must give him immunity from criminal prosecution.

2. The second question tendered by the Petition has a broader thrust than respondent conceives, as is evident from respondent's reformulation of it. (Compare Pet. 2 with Res.Br. 2) It is not only the possibility that the oral instruction of the court might have been embellished by the bailiff which concerns petitioner. Petitioner asserts his constitutional right not to have any communication between court and jury in his absence, whether the communication was from court to jury or from jury to court. Petitioner is concerned as much by the note which the court received from the jury, and which neither he nor his counsel have ever seen, as he is by the oral communication through the bailiff to the jury.

Respondent recognizes that petitioner has questioned the contents of the first note, but dismisses this with the remark that "the trial judge announced that it 'stated that the jury could not agree. That is all they said' (R. 365a)." (Res.Br. 7). The point cannot be disposed of so readily. In context it is not clear that the judge was as precise in his recollection as the partial quotation above would suggest. He continued by making an a priori argument as to why that must have been

what the jury had said (365a), and a moment later said that the missing note "was at least in substance the same" as the second note from the jury, which is a matter of record. When the point was made that the second note had been read into the record, quite unlike the first note, the court's comment was: "I don't remember." (365a).

Even if the trial court's recollection were as forceful as respondent understands it to be, it would not answer the point. The record does not show what was in the note the jury sent the judge. It shows only what the judge said, five days later, was in the note. It implies no disrespect for federal judges in general, or for the judge who presided at the trial of this case in particular, to suggest that human memory is a fallible thing. Elaborate rules in the law of evidence have been built on the proposition that "as respects oral testimony purporting to give from memory the terms of a writing, there is a special risk of error, greater than in the case of attempts at describing other situations generally." McCormick, Evidence 410 (1954). If a witness in a suit—even though he be a federal judge—were called to testify as to the important writing, he would not be permitted to describe its contents without first accounting for nonproduction of the original, and then would be subject to searching cross-examination to test the accuracy of his recollection.

This illustrates one of the most important reasons for the rule against communications between court and jury save in the presence of the defendant. When that rule is departed from, as here, either the subsequent statement of the judge as to what transpired must

be accepted without question, which would be unrealistic, or the judge must be subjected to cross-examination and impeachment, which would be undesirable. Rigorous insistence on the rule against private communications maintains the role of the judge as an impartial mediator whose word need never be questioned, and best maintains the confidence of the bar and the public in the federal judiciary.

There are things which may have been said in the missing note which would have been highly prejudicial to petitioner. See *Mullin v. United States,* 356 F.2d 368 (D.C. Cir. 1966). We do not know if they were said. There are things which the bailiff may have said to the jury which would have been highly prejudicial. See *Wheaton v. United States,* 133 F2d 522 (8th Cir. 1943). We do not know if they were said. The plain fact is that neither petitioner nor respondent knows, or can know, whether petitioner was harmed by the "obvious error" in violation of his constitutional right which took place at the trial. The suggestion that petitioner stood mute in the trial court, gambling on an acquittal (Res.Br. 8), is belied by his three motions for a mistrial. The conviction should not stand in these circumstances.

Respectfully submitted,

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219
Attorney for Petitioner

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
of Counsel

August 8, 1966

INDEX

	Page
Statement	2
Summary of argument	4
Argument:	
I. The government does not view the "required records" doctrine of *Shapiro* v. *United States* as directly applicable in the instant cases	8
II. *Kahriger* and *Lewis* strike a proper balance between the privilege and the power to tax	12
III. Alternatively, a use-restriction rule should be adopted instead of holding the wagering tax provisions unconstitutional	26
IV. The government does not contend that the obligation to pay the special occupational tax and the wagering excise tax can be satisfied without filing the required registration statement and tax return	37
Conclusion	41

CITATIONS

Cases:

Adams v. *Maryland*, 347 U.S. 179	27
Albertson v. *Subversive Activities Control Board*, 382 U.S. 70	5, 6, 11, 15, 24, 25, 26, 28, 39
Billings v. *United States*, 232 U.S. 261	25
Cohen v. *Hurley*, 366 U.S. 117	36
Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1	10
Curcio v. *United States*, 354 U.S. 118	12
Garrity v. *New Jersey*, 385 U.S. 493	36
James v. *United States*, 366 U.S. 213	15
Lewis v. *United States*, 348 U.S. 419	5, 6, 12, 14, 15, 22, 23, 24, 26, 28, 36, 37, 41
License Tax Cases, 5 Wall. 462	19, 21, 23
Lorenzo v. *Wirth*, 170 Mass. 596	20

Cases—Continued Page

McCray v. *United States*, 195 U.S. 27 19
Murphy v. *Waterfront Commission*, 378 U.S. 52 ...5, 6, 14, 19, 27, 28, 29, 30, 31, 33, 35
Nigro v. *United States*, 276 U.S. 32 19
Russell v. *United States*, 306 F. 2d 402 12
Rutkin v. *United States*, 343 U.S. 130 15
Schmerber v. *California*, 384 U.S. 757 14
Shapiro v. *United States*, 335 U.S. 1 .....3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 28, 36
Sonzinsky v. *United States*, 300 U.S. 506 ..... 19, 39
Spevack v. *Klein*, 385 U.S. 511 ..... 28, 36
Twining v. *New Jersey*, 211 U.S. 78 32
Ullmann v. *United States*, 350 U.S. 422 27
United States v. *Ansani*, 138 F. Supp. 451 12
United States v. *Blue*, 384 U.S. 251 27
United States v. *Calamaro*, 354 U.S. 351 17
United States v. *Constantine*, 296 U.S. 287 ..... 16, 23
United States v. *Doremus*, 249 U.S. 86 19
United States v. *Kahriger*, 345 U.S. 22 .....5, 6, 11, 12, 14, 15, 22, 23, 24, 26, 28, 29, 36, 37, 41
United States v. *Mungiole*, 233 F.2d 204 38
United States v. *One Ford Coupe*, 272 U.S. 321 19
United States v. *Sanchez*, 340 U.S. 42 19
United States v. *Stafoff*, 260 U.S. 477 19
United States v. *Sullivan*, 274 U.S. 259 ..16, 24, 25, 26, 31
Wong Sun v. *United States*, 371 U.S. 471 35

Constitution, statutes and regulations:

Constitution of the United States:
Fifth Amendment 2, 3, 8, 12, 14, 19, 22, 23, 25, 28, 32, 36
Tenth Amendment 19
26 U.S.C. 4401 ..... 2, 39
26 U.S.C. 4403 .....5, 11, 12
26 U.S.C. 4411 ..... 2, 38
26 U.S.C. 4412 ..... 2, 37
26 U.S.C. 4422 ..... 20, 32
26 U.S.C. 4423 11
26 U.S.C. 6001 11

Statutes—Continued

	Page
26 U.S.C. 6011	39
26 U.S.C. 6107	33, 34
Treasury Regulations (26 C.F.R.):	
Section 44.4401-1(2)(iv)	16
Section 44.6011(a)-1(a)	39
Miscellaneous:	
Comment, 65 Colum. L. Rev. 681	13
97 Cong. Rec. 12231-12243	17
Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 87th Cong., 1st Sess.	17
H. Rep. No. 586, 82d Cong., 1st Sess.	17, 20, 38
Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 Sup. Ct. Rev. 103	9, 15, 21, 25, 29, 30
Note, 76 Yale L. J. 839	36
S. Rep. No. 781, 82nd Cong., 1st Sess.	17, 20, 38

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 2

JAMES MARCHETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 12

ANTHONY M. GROSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

STATEMENT

Both of these cases were argued last Term, and present closely related questions involving the constitutional validity of the federal wagering tax laws (26 U.S.C. 4401 *et seq.*). *Marchetti* involves a conviction for failure to register and pay the fifty-dollar special occupational tax on persons engaged in the business of accepting wagers, as required by 26 U.S.C. 4411, 4412.[1] Certiorari was granted in *Marchetti* limited to the question whether "the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment," so that the Court, "especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965), [should] overrule *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955)" (385 U.S. 1000). *Grosso* involves a conviction for failure to pay the ten-percent excise tax on wagers imposed by 26 U.S.C. 4401, in addi-

[1] Certiorari was initially granted in *Costello* v. *United States* (383 U.S. 942). Petitioner Costello died in December 1966. On January 9, 1967, the Court granted certiorari in *Marchetti* (385 U.S. 1000), a companion case, and set it down for argument in lieu of *Costello*, which has been held in abeyance (No. 3, this Term). Because of the shortness of time before oral argument, and since the cases were virtually identical (petitioners in the two cases were tried and convicted together), the record and the government's brief in *Costello* were used in *Marchetti*. In both *Costello* and *Marchetti* the grant of certiorari was limited to the question of the constitutionality of the wagering tax provisions under the Fifth Amendment's privilege against self-incrimination.

tion to failure to pay the special occupational tax. Thus, the principal question presented for determination in *Grosso* is whether the excise tax on wagering violates petitioner's Fifth Amendment privilege against self-incrimination.[2]

On June 12, 1967, the Court restored these two cases to the docket for reargument this Term (388 U.S. 903, 904), and requested counsel to discuss, in addition to the question previously specified, the following questions:

In *Marchetti*:

> (1) What relevance, if any, has the required records doctrine, *Shapiro* v. *United States*, 335 U.S. 1, to the validity under the Fifth Amendment of the registration and special occupational tax requirements of 26 U.S.C. §§ 4411, 4412?
>
> (2) Can an obligation to pay the special occupational tax required by 26 U.S.C. § 4411 be satisfied without filing the registration statement provided for by 26 U.S.C. § 4412?

In *Grosso*:

> (1) What relevance, if any, has the required records doctrine, *Shapiro* v. *United States*, 335 U.S. 1, to the validity under the Fifth Amend-

---

[2] A separate question, relating to the propriety of the trial judge's treatment of a note from the jury, was raised in the petition for certiorari in *Grosso*, and the Court's grant of certiorari was not limited to the self-incrimination issue (385 U.S. 810). We refer the Court to our previous brief for the government's position on this question (see Govt *Grosso* Br. 30-34), and include no further discussion of this point in the instant brief.

ment of the obligation to pay the wagering excise tax imposed by 26 U.S.C. § 4401?

(2) Is satisfaction of an obligation to pay a wagering excise tax imposed by 26 U.S.C. § 4401 conditioned upon the filing of a return required under 26 U.S.C. § 6011 and pertinent regulations? If it is not, what information, if any, must accompany the payment of a wagering excise tax obligation in order to extinguish the taxpayer's liability for that obligation?

Since our basic position in these cases rests essentially upon a common foundation, we treat both in this single brief. To the extent that there are differences which raise divergent considerations, we will make this clear in the course of our discussion. The instant brief is substantially limited to the questions specified in the Court's reargument orders, although we do attempt here to develop more extensively some of the points made previously. For a full development of the government's position and a discussion of the other aspects of the two cases, we respectfully refer the Court to our briefs filed last Term (herein referred to as "Govt *Costello* Br." and "Govt *Grosso* Br.").

SUMMARY OF ARGUMENT

The "required records" doctrine of *Shapiro* v. *United States*, 335 U.S. 1, is not, in the government's view, directly applicable in the instant cases. That doctrine relates to records which are required to be kept as distinguished from reports which are required to be filed with the government. Such rec-

ords are not, as a general matter, directly testimonial, and cannot become incriminatory unless production is demanded and their contents analyzed. Reports—such as registration statements and tax returns—involve, on the other hand, an affirmative declaration of certain specified information and must be filed periodically, rather than simply maintained in the routine and ordinary course of conducting a business. *Shapiro* may relate to the daily record of wagers required to be kept under 26 U.S.C. 4403, but no such records are involved in the instant cases.

Shapiro is not wholly irrelevant here, however, since it stands for the proposition that, in appropriate situations, some accommodation between the government's need for information and the scope of the privilege against self-incrimination is proper. Self-reporting accompanied by some disclosure is a bedrock concept in our tax structure, and has considerable relevance in non-tax areas as well. A majority of this Court has consistently chosen the path of accommodation between the government's need for information and the privilege. The rationale of *Kahriger* and *Lewis*, properly considered, reflects such an accommodation, as do *Shapiro* and *Murphy* v. *Waterfront Commission*, 378 U.S. 52. Since an individual's entering into the gambling business is a matter of choice, there is nothing coercive about attaching federal tax conditions on his engagement in that business. The holding in *Albertson* is distinguishable since here the registration and return requirements serve a legitimate governmental interest sepa-

rate and independent from a concern with the underlying activity as such, and seek only a minimal amount of information necessary for the collection of taxes.

Gambling is a large-scale and thriving business in this country, although illegal in most places, and thus is a proper subject for excise taxation. Congress enacted the wagering tax as a revenue measure, and it has in fact produced a significant amount of revenue. Because Congress can properly tax gambling does not mean that it could similarly tax any and all illegal activities. Gambling is an ongoing and continuing business, is organized and run like other businesses, and has customers and employees—unlike sporadic criminal activities such as kidnapping and robbery.

The income tax situation involved in *United States* v. *Sullivan*, 274 U.S. 259, is doubtless distinguishable from the instant cases. Yet a challenge to the rationale of *Sullivan*, as spelled out in *Albertson*, is a predictable sequel to a decision overruling *Kahriger* and *Lewis*. Such a decision, if rendered, should therefore be predicated on a ground which will not impair the viability of *Sullivan*. If *Kahriger* and *Lewis* are not followed, adoption of a use-restriction rule, like that in *Murphy*, would achieve this result and would uphold the exercise of the taxing power while fully protecting the privilege.

No incrimination can result if information required to be disclosed cannot be used in a subsequent criminal prosecution. What we alternatively suggest is a rule prohibiting the use of any

compelled information, directly or indirectly, in a later prosecution, State or federal, relating to the underlying gambling activity made subject to the wagering tax. Such a rule would not amount to the judicial creation of an immunity statute. All that need be adopted in the instant cases is a use-restriction rule of narrow and limited applicability, since there is a clear governmental interest in obtaining the information, only a minimal disclosure is sought, and the governmental interest stems from the taxing power and does not reflect primarily a concern with the underlying activity involved. Under such a rule the privilege will be fully protected, for the burden will be on the prosecution to show an independent source for its information when it proceeds criminally against one who has complied with the wagering tax laws.

Finally, the government does not contend that the obligation to pay the special occupational tax and the wagering excise tax can be satisfied without filing the required registration statement and tax return. This approach is required by the pertinent statutory provisions, and reflects the current Treasury regulations and administrative practice. Enforcement of any tax measure necessitates the obtaining of a certain amount of information about those subject to the tax. The minimal amount of information sought under the wagering tax statutes is essential to the collection of the prescribed taxes.

ARGUMENT

I. The Government Does Not View the "Required Records" Doctrine of *Shapiro* v. *United States* as Directly Applicable in the Instant Cases

In *Shapiro* v. *United States*, 335 U.S. 1, this Court held that a wholesale fruit and produce dealer, licensed to do business under the Emergency Price Control Act, and required by O.P.A. regulations to keep records of business activities "of the same kind as he has customarily kept" prior to the adoption of such regulations, could be compelled to disclose these records pursuant to a subpoena *duces tecum* even though they might tend to incriminate him of violating the price control law. Shapiro's conviction for violation of the price regulations, based in part upon evidence obtained from his business records, was thus sustained by the Court. In rejecting the argument that its holding would result in the compelled production of self-incriminatory evidence in violation of the Fifth Amendment, the Court pointed out that, while "there are limits which the Government cannot constitutionally exceed in requiring the keeping of records" (335 U.S. at 32), those limits had not there been exceeded. It concluded "that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established'" (*id.* at 33). Production of the records involved in *Shapiro* could be compelled,

consistent with the Fifth Amendment, because of their relationship to the regulatory power embodied in the Emergency Price Control Act and the pertinent regulations adopted under that legislation. *Shapiro* holds, therefore, that the legitimate exercise of a regulatory power by the government may result in certain documents being regarded as outside the scope of the privilege against self-incrimination.

Nevertheless, we do not regard the "required records" doctrine for which *Shapiro* stands to be of direct relevance in the instant cases. In one of our briefs last Term we stated that, on the facts of that case, there was no need to consider "any possible relationship between the privilege against self-incrimination and the so-called 'required records' doctrine" in the wagering tax context (Govt *Costello* Br. 25, n. 24).[3] We believe that position to be the correct one, and do not contend that *Shapiro* has direct application to the situations presented in the instant cases. *Shapiro* deals with the maintaining of records, not

---

[3] In its single opinion in the *Costello* and *Marchetti* cases (reported at 352 F.2d 848), the Second Circuit stated that it was "not required to consider other arguments on which the Government might rely, such as * * * the required records doctrine, see *Shapiro* v. *United States*, 335 U.S. 1 (1948) * * *" (*Costello* R. 21). Similarly, no mention was made of *Shapiro* in the Third Circuit's opinion in *Grosso* (reported at 358 F.2d 154; see *Grosso* R. 127-128). And, as petitioners point out, the Court in *Albertson* made no reference whatever to *Shapiro* in the course of its opinion (*Grosso* Rearg. Br. 13; *Marchetti* Rearg. Br. 16). See Mansfield, *The Albertson Case: Conflict between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 Sup. Ct. Rev. 103, 114 (hereinafter "Mansfield").

the filing of returns or registration statements. Properly considered, in our view, the "required records" doctrine does not deal with *reports* which are required to be filed with the government and which entail an affirmative declaration of certain specified information, as distinguished from *records* which are required to be kept incident to a tax or regulatory program and which are subject to governmental inspection. Tax returns and registration statements may have certain "public aspects" (335 U.S. at 34), but they must be filed, not maintained, and hardly relate, in any necessary way, to transactions which "could lawfully [be] engage[d] [in] solely by virtue of the license granted * * * under the [pertinent regulatory] statute" (*id.* at 35).[4] *Shapiro* involved essentially those types of records which are regularly and customarily kept, pursuant to statutes or regulations, in the routine and ordinary course of conducting a certain business.[5] Such records are not, as a general matter, directly testi-

---

[4] In his dissent in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, Mr. Justice Douglas pointed to the distinction we view as pertinent in this regard. He stated (*id.* at 179-181): "The compiling, the signing, and the filing of the registration statement required of officers, directors, and others by the registration form is a form of elicited testimony, not the surrender of pre-existing records. * * * The cases dealing with the duty to keep records (see *Shapiro* v. *United States, supra*) can be put to one side. * * * Where individuals compile and sign the registration statement, as they must, it is the very making of the registration statement that will incriminate them, not the underlying documents."

[5] In fact, the pertinent regulation in *Shapiro* called for the maintaining of "records of the same kind as [the regulated business] has customarily kept" (335 U.S. at 5, n. 3).

monial in the way that registration statements and tax returns are, and cannot become incriminatory unless production is demanded and their contents analyzed. Nor are they closely akin to reports whose periodic filing, on government-provided forms, is required, and which, but for that requirement, would not otherwise be prepared. Some such reports, like the registration statement involved in *Albertson* (see 382 U.S. at 77-78), can, by virtue of the information required to be provided, be directly incriminating.

More analogous to the kind of records dealt with in *Shapiro* is the "daily record showing the gross amount of all wagers" required to be kept by one engaged in the business of accepting wagers, pursuant to 26 U.S.C. 4403.[6] But no such records were ever sought from petitioners in these cases; nor were they charged with failing to keep such records or with refusing to permit inspection of them. Moreover, the validity of the requirement of Section 4403 was never raised or passed upon by any of the courts below. Thus, in the instant cases, there is no issue before the Court as to records of that type.[7] In an

---

[6] In addition to the requirement of Section 4403, 26 U.S.C. 4423 provides for the inspection of "the books of account of any person liable for" the payment of the federal wagering tax, and 26 U.S.C. 6001 requires persons liable for any tax to "keep such records" as may by regulation be prescribed (see *Grosso* Rearg. Br. 12).

[7] Presumably, it was for similar reasons that the Court made only a passing reference to *Shapiro* in its *Kahriger*

appropriate case the question of the applicability of the "required records" doctrine to the Section 4403 requirement may of course be raised, but that question is not presented here.[8]

In sum, therefore, our answer to the Court's first questions in the reargument orders in these two cases is that the "required records" doctrine of *Shapiro* has no direct bearing upon the registration and return requirements of the wagering tax laws.

II. *Kahriger* and *Lewis* Strike a Proper Balance Between the Privilege and the Power to Tax

That we take this view as to the applicability of the "required records" doctrine does not mean, however, that we regard the underlying rationale of *Shapiro* wholly irrelevant in the instant cases. Although we draw a distinction between reports required to be made and records required to be kept and conclude that the holding in *Shapiro* governs only the latter, that case does stand for the proposition that the Fifth Amendment's privilege against self-incrimination is not an absolute and that some accommodation is proper between the government's need for in-

---

opinion (345 U.S. at 33, n. 13), and no mention of the "required records" doctrine in *Lewis* (compare *Marchetti* Rearg. Br. 17).

[8] Both petitioners take the position that *Shapiro* is of no direct relevance in the instant cases (see *Grosso* Rearg. Br. 7; *Marchetti* Rearg. Br. 14). As to the inapplicability of *Shapiro* to reports, as distinguished from records, see generally *Russell* v. *United States*, 306 F.2d 402, 410-411 (C.A. 9); *United States* v. *Ansani*, 138 F. Supp. 451, 453-454 (N.D. Ill.); see also *Curcio* v. *United States*, 354 U.S. 118.

formation and an extension of the privilege to its utmost potential limits.[9] Indeed, both petitioners concede that the *Shapiro* doctrine sanctions some inroads on the potential scope of the privilege (*Grosso* Rearg. Br. 18-19; *Marchetti* Rearg. Br. 15-18).

Taxation in this country has traditionally been, in essence, a self-assessing and self-reporting system. This self-reporting is generally accomplished through the filing of tax returns. Similarly, registration provisions have long antecedents in the tax field (see Govt *Costello* Br. 9-10). Voluntary compliance accompanied by some degree of disclosure is indeed fundamental to the administration of the Nation's tax system. That concept—a bedrock of our tax structure—has considerable and growing relevance in other regulatory fields as well, and is essential to the government's effective performance of its role in modern society.[10]

Reconciliation of the government's need to acquire and use information—in an age of many, large-scale governmental programs whose administration would be impossible without an extensive amount of voluntary compliance and self-reporting—with the constitutional protection against compelled disclosure of incriminating information of a testimonial nature is hardly an easy task. Striking the balance heavily in favor of either the government or the individual

---

[9] See Comment, 65 Colum. L. Rev. 681, 682 (1965).

[10] See Govt *Costello* Br. 13, n. 11, for a listing of a few of the businesses and individuals from which disclosures are required under exercises of federal regulatory power.

would be undesirable and would have disruptive and unfortunate consequences. A majority of this Court has consistently chosen the path of accommodation. *Shapiro* is representative of one form of such accommodation. So is the rule of *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 79, which provides the primary basis for our suggested alternative rationale in the instant cases—that of a use-restriction rule similar to that fashioned by the Court there (see Govt *Costello* Br. 17-25; Govt *Grosso* Br. 18-28). Even more recently, in *Schmerber* v. *California*, 384 U.S. 757, 762, the Court pointedly stated that "the privilege has never been given the full scope which the values it helps to protect suggest."

Kahriger and *Lewis*, properly considered, make a like accommodation between the demands of the Fifth Amendment and the needs of the government for information.[11] The registration and return require-

---

[11] As stated in the concurring opinion of Mr. Justice Jackson in *Kahriger* (345 U.S. at 34-35): "[W]e deal here with important and contrasting values in our scheme of government, and it is important that neither be allowed to destroy the other. * * * Extension of the immunity doctrines to the federal power to inquire as to income derived from violation of state penal laws would create a large number of immunities from reporting which would vary from state to state. Moreover, the immunity can be claimed without being established, otherwise one would be required to prove guilt to avoid admitting it. Sweeping and undiscriminating application of the immunity doctrines to taxation would almost give the taxpayer an option to refuse to report, as it now gives witnesses a virtual option to refuse to testify. The Fifth Amendment should not be construed to impair the taxing power conferred by the original Constitution, and especially by the Sixteenth Amendment,

ments serve a governmental interest separate and independent from an interest in the underlying activity as such, and seek only the minimal amount of information necessary for the collection of taxes. The holding in *Albertson* thus does not require the overruling of *Kahriger* and *Lewis* (see Govt *Costello* Br. 15-17). Not only did the Court refer in those cases to the prospective nature of the registration requirement; [12] it pointedly stated that, since an individual's entering into the business of gambling is a matter of choice, there is nothing coercive about attaching a condition on his engagement in that business—that he comply with the federal tax laws (348 U.S. at 422-423).[13]

Reluctance to accept the *Kahriger-Lewis* rationale as a viable accommodation between the privilege and the government's need for information stems in large part, we submit, from the view that the wagering tax is not a "good-faith revenue measure" (345 U.S. at 35, concurring opinion of Mr. Justice Jackson; see also dissenting opinion of Mr. Justice Frankfurter, 345 U.S. at 37, 40). As noted in our *Costello* brief (pp. 11-12, n. 8), because of the Court's limited grant of certiorari we assumed that the validity of the wagering tax as a tax was not at issue in the instant cases. However, the question has been repeatedly al-

---

further than is absolutely required." See also *James* v. *United States*, 366 U.S. 213; *Rutkin* v. *United States*, 343 U.S. 130.

[12] See Mansfield 153, 156-158.

[13] See Govt *Costello* Br. 12-15; Govt *Grosso* Br. 16-18; see also the discussion *infra*, pp. 22-24.

luded to by petitioners,[14] and deserves some comment.

An assumption which seems frequently to be made in this regard is that, if Congress can validly tax gambling, it could also exercise the taxing power against the "kidnapper" or "robber" by the simple expedient of terming such activities a "business". That assumption is not well founded. A business surely does not cease to be such merely because it is illegal. Liquor was a business subject to a federal tax during prohibition;[15] gambling is a business subject to such a tax now. This is how Congress regarded it when it enacted the wagering tax statutes. As we pointed out in our *Costello* brief (p. 9), the principal purpose of the wagering tax—as with other excise taxes enacted at the same time—was to help meet the exigent revenue requirements posed by the Korean War. This purpose is plainly confirmed by the pertinent legislative history (see Govt *Grosso* Br. 11-12). By its very nature, gambling has all the ap-

---

[14] *E.g.*, *Marchetti* Rearg. Br. 12; *Grosso* Rearg. Br. 18. Petitioner Marchetti, while stating at one point that the ten-percent excise tax is roughly equivalent to the amount generally realized as the margin of profit on illegal gambling in this country (*Marchetti* Rearg. Br. 8), somewhat inconsistently notes, several pages later (*id.* at 10, n. 6), that the pertinent Treasury regulations expressly contemplate the passing on of the tax to, and thus, in effect, its collection from, those placing the bets (Treas. Reg. 44.4401-1(2)(iv)).

[15] See *United States* v. *Constantine*, 296 U.S. 287, 293, where the Court stated: "It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law. The rule has always been otherwise."

pearances of an ongoing business. Its continuity of operation and organizational makeup—from an executive hierarchy to a staff of regularly paid employees who keep records and perform other clerical functions (see *United States* v. *Calamaro*, 354 U.S. 351, 353-354)—give it the earmarks of many other businesses. In recommending adoption of the statutes here involved the congressional committees pointed out: "Commercialized gambling holds the unique position of being a multi-billion-dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. The relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation." See H. Rep. No. 586, 82d Cong., 1st Sess., p. 55; S. Rep. No. 781, 82d Cong., 1st Sess., p. 113; see also 97 Cong. Rec. 12231-12243.

It may have been naive for the Congress which passed the wagering tax provisions as a revenue measure to assume that people who violate State law would voluntarily comply with federal law and pay the tax due—then estimated to amount to some $400 million annually. Perhaps with more funds the measure could be more effectively enforced and produce more revenue.[16] Be that as it

[16] See Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 87th Cong., 1st Sess., Pt. I, pp. 95, 98-99, 105 (testimony of Commissioner of Internal Revenue Caplin). Commissioner Caplin estimated that the wagering tax laws, if fully complied with, would bring in almost $5 billion annually (*id.* at 98).

may, Congress certainly could understandably conclude that the gambling business should be as much subject to taxation as, for example, the selling of jewelry and that excise taxes should be collected from those engaged in that business. Considerable deference should be given to that congressional determination. Not only was the wagering tax enacted as a revenue measure; the fact is that it has produced, and does produce, a significant amount of revenue (over $100 million since its enactment in 1951),[17] although the yield has been much less than was originally anticipated.

Nor—as this Court has frequently held in situations where the potential for revenue is significantly

---

[17] In a letter filed with the Clerk of this Court subsequent to the argument of the instant cases last Term, the government noted that the total amount of revenue derived from the wagering taxes from 1952 through 1966 was about $106 million (letter of Solicitor General of January 23, 1967). In that letter it was stated that the estimated cost of enforcing the wagering tax laws during that period, including both Internal Revenue Service costs and Justice Department costs incident to prosecutions, was approximately $27 million. Petitioner Marchetti apparently challenges that figure, and points out that the I.R.S. costs listed included only those of the Intelligence Division (*Marchetti* Rearg. Br. 12, n. 8). However, we noted in that letter (p. 2) that enforcement of these laws "is primarily handled by the Intelligence Division" of the I.R.S., and pointed out that the estimated figures provided did not include overhead (which would exist without the wagering tax) or "the cost of relatively minor clerical [and] record-keeping tasks performed by other divisions of the Internal Revenue Service" (*ibid.*). We still regard the figures provided to reflect approximately the total cost of enforcing the wagering tax laws during the relevant period.

less [18]—does it militate against the validity of the tax as a tax that total enforcement might discourage persons from going into the gambling business. As this Court said some 100 years ago in the *License Tax Cases* (5 Wall. 462, 473):

> There is nothing hostile or contradictory * * * in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of

---

[18] See, *e.g.*, *McCray* v. *United States*, 195 U.S. 27 (tax on oleomargarine); *United States* v. *Doremus*, 249 U.S. 86 (narcotic drugs); *Nigro* v. *United States*, 276 U.S. 32 (same); *United States* v. *Sanchez*, 340 U.S. 42 (marihuana); *Sonzinsky* v. *United States*, 300 U.S. 506 (firearms); *United States* v. *Stafoff*, 260 U.S. 477 (liquor); *United States* v. *One Ford Coupe*, 272 U.S. 321 (same). Although these decisions dealt, in terms, with Tenth Amendment and due process claims, they apply as well, in our view, to challenges to federal excise taxes resting on Fifth Amendment grounds—particularly in light of the fact that this Court was obviously aware of the potential Fifth Amendment issue when it decided a number of these cases. See Govt *Grosso* Br. 7-12.

Moreover, at least as to the cases dealing with the excise taxes on businesses made illegal under federal law (*e.g.*, *Stafoff*, *Doremus*, *Nigro*, *Sanchez*, *One Ford Coupe*), no dual sovereignty considerations could be urged as indicating that a Fifth Amendment question was irrelevant, as might be suggested with regard to situations where the *States* declared illegal the business subjected to the federal taxing power. Cf. *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 63-77; see Govt *Costello* Br. 15, n. 14; see generally Govt *Grosso* Br. 8-10.

> the State to be a justification for the violation of the laws of the Union.

As phrased in the reports of the congressional committees recommending adoption of the wagering tax laws:

> * * * [P]roposals for a Federal tax on wagering are sometimes criticized as in effect sanctioning the carrying on of gambling activities in violation of [State] laws. The committee does not share this view. Since its inception, the Federal income tax has applied without distinction to income from illegal as well as legal sources, and it has never been generally supposed that such application carried with it any implied authorization to carry on illegal activities.* * * [19]

Nor does it follow that if the provisions involved in these cases are held valid, Congress, with equal constitutional authority, could adopt legislation imposing a tax on kidnappers and robbers requiring them to register and reveal their criminality under the theory that it was merely taxing "business" activities. In Mr. Justice Holmes' phrase, "Too broadly generalized conceptions are a constant source of fallacy." *Lorenzo* v. *Wirth*, 170 Mass. 596, 600. As we have indicated, gambling is in fact a large-scale

---

[19] H. Rep. No. 586, 82d Cong., 1st Sess., p. 55; S. Rep. No. 781, 82d Cong., 1st Sess., p. 113; see also Govt *Grosso* Br. 26-27, discussing petitioner Grosso's contentions regarding 26 U.S.C. 4422, which provides that compliance with the wagering tax laws "shall not exempt any person from any penalty provided" by federal or State law for engaging in the underlying activity whose proceeds are taxed (see the discussion *infra*, p. 32).

and thriving business, even if an illegal one in most States. It is run like a business; it has customers and employees; it is continuing and ongoing in nature, and, more often than not, a joint and collective endeavor. Most gamblers, of necessity, maintain detailed and elaborate books and records. Some of the aspects of gambling, from the earliest times, have been held to be a proper subject of taxation. See the *License Tax Cases, supra.*

Kidnapping and robbery, on the other hand, have no such characteristics or history. They are sporadic activities with no clearly defined uniformity or continuity of operation. A robber or "gang" of robbers conveys an entirely different concept than a business-like organization geared to accept wagers. The robber sells no services. His "gang" is usually no more than a loosely knit combination which is dissolved at the completion of the crime, to be reformed in time for the next crime, if at all. Furthermore, crimes like robbery and kidnapping are universally condemned criminal acts which have never been the subject of the taxing power and from whose perpetrators there would not be even a remote chance of collecting substantial amounts of revenue. In such circumstances, to impose a tax would be nothing more than to impose an additional criminal penalty. Cf. Mansfield 129-130. Not so with respect to gambling, however, which is neither *malum in se* nor universally prohibited.

If the Court accepts the view that the wagering tax provisions constitute a valid exercise of the constitutional power to tax and should be vindicated even

though an ancillary consequence may be some disclosure of otherwise potentially incriminating information, it should of course reject petitioners' attack upon *Kahriger* and *Lewis*. We have discussed these cases in detail in the *Costello* (pp. 12-17) and *Grosso* (pp. 16-18) briefs filed last Term. At this juncture, we wish only to re-emphasize what we regard as the underlying rationale of those decisions.

We read *Kahriger* and *Lewis*, properly considered, as epitomizing the self-reporting concept here discussed (*supra*, pp. 13-15), and as embodying a realistic accommodation with Fifth Amendment guarantees. Taxation is a normal—one might, perhaps, say inevitable—incident of business activity. The gambling business is not entitled to special status because it is, in most places, an illegal business. One does not have to accept wagers in a professional capacity nor run the risk of the criminal sanctions which might flow from that activity. A potential gambler knows that he is required to comply with a federal tax measure which might enhance the chances that his conduct will come to the attention of prosecuting authorities.[20]

---

[20] *Kahriger* and *Lewis* hold that if the prospective gambler determines to proceed in the gambling business, he must be regarded as having voluntarily assumed the conditions placed thereon by the federal tax laws—that he must register, file returns and pay the prescribed taxes. This analysis does not lead to the conclusion that the would-be burglar, for example, cannot claim the privilege since he is free to choose whether to commit the burglary or not. Unlike the prospective burglar, the would-be gambler knows, before he engages in gambling, not only that gambling may be unlawful under State or local law—he also knows that it is a business to which Congress has attached certain tax burdens. As to the substantive

If, in view of these known tax requirements, he nevertheless decides to enter the gambling business, it would seem wholly incongruous for him to be immune from the federal excise tax and the related requirements (or, alternatively, that in order to tax the business Congress must make it legal). Compare the *License Tax Cases, supra.* In such circumstances, a viable approach, as the Court reasoned in *Kahriger* and *Lewis*, is to treat the decision to enter the business as the equivalent of a non-compelled choice in terms of Fifth Amendment rights. Federal taxation, in other words, is a known condition of engaging in the gambling business, with whatever that might entail for the individual gambler.[21] So viewed, the decision to gamble is a voluntary one and accordingly lacks the crucial element of compulsion—the basic danger against which the privilege protects.[22] As the Court

---

offense, he stands in the same situation as the would-be burglar; as to the tax obligations, however, he does not—they are conditions attached to his engaging in the business, whether it is lawful or not. This does not mean that any activity is a proper subject for taxation (see the discussion *supra*, pp. 20-21). Nor does it mean that Congress can tax activities because and only insofar as they are unlawful. *United States* v. *Constantine*, 296 U.S. 287 (see Govt *Costello* Br. 12, n. 10; Govt *Grosso* Br. 10, n. 6).

[21] Petitioners repeatedly seek to analogize (*e.g.*, *Grosso* Rearg. Br. 14-15) between gamblers required to comply with the wagering tax laws and witnesses called to testify. But, unlike the witness called upon to testify before a grand jury or an investigative body, who cannot generally choose to appear or not, the prospective gambler can choose to gamble or not to gamble (see also the discussion in note 25, *infra*).

[22] While it is true that the Court—particularly in *Kahriger*—emphasized the prospective nature of the registration and

said in *Lewis* (348 U.S. at 422-423):

> The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax.

Despite petitioners' protestations to the contrary (*e.g.*, *Marchetti* Rearg. Br. 13), the predictable sequel to these cases, if *Kahriger* and *Lewis* are overruled, is an attack upon the rationale of *United States* v. *Sullivan*, 274 U.S. 259. As stated in our *Costello* (pp. 22-23, n. 21) and *Grosso* (p. 11, n. 8) briefs last Term, we regard the income tax situation involved in *Sullivan* as distinguishable from the matters involved here—registration and excise tax requirements relating to those engaged in a business which, in one form or another, is unlawful in all but one of the States, and some of the interstate aspects of which are made criminal under federal law. Income tax returns contain questions "neutral on their face and directed at the public at large [and not] * * * at a highly selective group inherently suspect of criminal activities." *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79. We recognize further that these differences are not insubstantial and that an accommodation of the power to tax *income* with

---

occupational tax (see 345 U.S. at 32-33), the broader implication of both rulings was that there is no compulsion within the purview of the Fifth Amendment in the requirement that one comply with the wagering tax laws. See Govt *Grosso* Br. 17-18.

Fifth Amendment guarantees would not be directly impaired by a holding that the provisions involved in the instant cases are constitutionally invalid.

Notwithstanding these differences, however, we point out that there is always some degree of collision between the Fifth Amendment and the exercise of the taxing power, since self-reporting, accompanied by some disclosure, is the traditional foundation of tax administration in this country. The taxing power and the privilege are both in the Constitution. When they collide, some accommodation must be made.[23] Here the contention, in essence, is that Congress cannot validly tax an activity that is unlawful under State law—because it is unlawful. What the gamblers will say in the subsequent case challenging *Sullivan* is that there is simply no effective way to avoid incrimination in reporting income from illegal sources—just as they say now that there is no way to comply with the wagering tax laws without incriminating themselves. Like the taxpayer in *Sullivan*, they seek in the instant cases to draw "a conjurer's circle around the whole matter" (274 U.S. at 264) by refusing to register and pay the tax at all. Upholding their contention here "would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim" (*Albertson* v. *Subversive Activities Control Board*, 382 U.S. at 79).[24] Yet that

---

[23] See *Billings* v. *United States*, 232 U.S. 261, 282; see also Govt *Grosso* Br. 10.

[24] See Mansfield, 116-120, especially 117.

was a significant point of distinction noted by the Court between *Sullivan* and *Albertson*.

At all events, if the Court rejects the accommodation which *Kahriger* and *Lewis* reflect, we urge that an essentially narrow ground, which will maintain the distinction of the *Sullivan* situation set out in the *Albertson* opinion, be predicated for that result. Otherwise, the Court will undoubtedly be faced, several terms hence, with the claim that, *sub silentio*, it has overruled *Sullivan* and exempted gamblers from income as well as excise taxation. If *Kahriger* and *Lewis* are not followed, adoption of the use-restriction rationale which we have suggested and discussed at some length in our *Costello* (pp. 17-25) and *Grosso* (pp. 18-28) briefs, would avoid the hazard of casting a shadow on the viability of the *Sullivan* rationale.

III. Alternatively, a Use-Restriction Rule Should Be Adopted Instead of Holding the Wagering Tax Provisions Unconstitutional

As suggested immediately above, if the Court should decide that the illegality surrounding gambling makes it inappropriate, in light of *Albertson*, to uphold the *Kahriger-Lewis* rationale, it by no means follows that either the registration or excise tax provisions must fall as an unconstitutional exercise of congressional power. On the contrary, as we urged in some detail in our briefs in *Costello* (pp. 17-25) and *Grosso* (pp. 18-28) last Term, the proper remedy would be to limit the use of the information obtained from registration and the filing of an excise tax return to

federal tax purposes. It seems plain that no incrimination could result if the information disclosed is confined solely to tax uses (see Govt *Costello* Br. 17-19; Govt *Grosso* Br. 19). An individual can hardly be "a witness against himself" if what he is required to disclose cannot be used against him, directly or indirectly, in a subsequent criminal prosecution. A fair accommodation may thus be achieved by barring the use of that information as evidence, as a link in an evidentiary chain or as an investigatory lead, with respect to any criminal prosecution, State or federal, based upon the underlying gambling activity made subject to the wagering tax. This is neither a novel or unworkable doctrine. See *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 78-79; *United States* v. *Blue*, 384 U.S. 251, 255; *Adams* v. *Maryland*, 347 U.S. 179, 181; cf. *Ullmann* v. *United States*, 350 U.S. 422, 437.

Having already elaborated on these matters in our briefs last Term, we limit our present discussion to a response to the argument that the suggested rationale is an open-ended doctrine and, in practical effect, would be an impermissible judicial conferral of immunity which, if applied here, could logically be applied in any other circumstances to devitalize the basic right to remain silent (see *Marchetti* Rearg. Br. 26-28; *Grosso* Rearg. Br. 19-20.)

We urge no "across-the-board" application of the *Murphy* rationale. There is plainly no occasion or need to so hold in the instant cases. We urge only that where there is a clear governmental interest in the information sought, where only a minimal or

limited disclosure is required, and where the interest in obtaining the information is grounded on a legitimate exercise of a separate and independent governmental power, and not principally a concern with the underlying activity involved, a persuasive case can be made for applying a use-restriction rule like that adopted in *Murphy*. Indeed, a more convincing argument can be made for applying such a rule in the instant circumstances than in the situation presented in *Murphy*. These cases involve the fundamental and essential governmental power to tax. As already observed, inherent in the nature of the taxing power is a self-reporting and disclosure concept which, to some degree at least, collides with the full sweep of the privilege (see *supra*, pp. 13-14). Accordingly, even if the Court rejects the approach of *Kahriger* and *Lewis*, it would seem that, at least as to the taxing power, some accommodation with Fifth Amendment considerations is warranted.[25] The Court

[25] Contrary to petitioner *Marchetti's* suggestion (Rearg. Br. 18, 26), we suggest no doctrinal distinction between oral testimony and writings insofar as the reach of the privilege is concerned. We recognize that the Court stated in *Albertson* that "if [an] admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes" (382 U.S. at 78). That statement, however, hardly constituted a *sub silento* overruling of *Shapiro*, as petitioner Marchetti intimates (Rearg. Br. 18); otherwise, the Court's treatment of *Shapiro* in *Spevack* v. *Klein*, 385 U.S. 511, 517-519 (see also Mr. Justice Fortas' concurring opinion, 385 U.S. at 520) is quite inexplicable (see note 33, *infra*), as are the references to *Shapiro* in the reargument orders in the instant cases. All that the gov-

thus need not choose between extremes; it may both preserve the taxing power and at the same time retain the essentials of the privilege—by adopting a use-restriction rule.[26] In short, it is the government's view that "by insulating the disclosure from prosecutory use, it may be possible both to preserve the essence of the privilege and at the same time give recognition to the government's interest in obtaining information for certain purposes." [27]

---

ernment suggested last Term (see Govt *Grosso* Br. 12-16) is that meaningful differences among various types of governmental inquiries—without regard to whether oral or written responses are sought—should be regarded as relevant in evaluating the substance of privilege claims and in determining what sort of government-individual accommodation, if any, would be appropriate in this regard. An inquiry which focuses upon a particular individual, and subjects him to an in-depth probe of various aspects of his activities—and, at least potentially, to harassment, intimidation and humiliation—obviously may be viewed differently, insofar as the Fifth Amendment is concerned, than a limited inquiry seeking a minimal amount of information necessary for a tax or regulatory purpose and reflecting a governmental interest separate and independent from that in any particular individual's underlying conduct. See generally Mansfield 110-113, 135-138, especially 135.

[26] See Mr. Justice White's extensive discussion of this matter in his concurring opinion in *Murphy*, 378 U.S. at 92-107.

[27] Mansfield 121. Later in the same piece, it is stated (*id.* at 160, 166): "Sometimes it is well that the privilege bend in order that it not break. The essentials of the privilege are not necessarily sacrificed by requiring disclosure of information when the use to which it is put is controlled and limited. * * * [U]se of incriminating information for purposes other than prosecution will satisfy the reason for compelling disclosure. Advantage should be taken of this fact to reduce the conflict between the privilege and other governmental policies."

Whatever may be the outer limits of the *Murphy* rationale, the instant cases fall well within them. In *Murphy* the State's valid interest in obtaining a witness's testimony clashed with the claim that the witness would potentially be subject to prosecution under federal law. The Court reconciled the competing interests involved as follows (378 U.S. at 79):

> We conclude * * * that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.

Similar conflicting interests are involved here. The federal interest in collecting revenue is a vital one, stemming from considerations wholly independent of

---

Mansfield suggests that an approach in determining when some accommodation between the privilege and the government's need for information is appropriate might be grounded on 1) whether the information requirement exists solely for the purpose of detecting and prosecuting crimes, as an added penalty, or, instead, for some other legitimate governmental purpose, and 2) if the latter, whether that purpose can be achieved even though the information obtained is never used in connection with a criminal prosecution (*id.* at 141). Here the registration and return requirements exist to facilitate the collection of taxes, and that purpose can plainly be achieved although the information disclosed is limited to tax uses only.

the legality or illegality of the activity being taxed. Moreover, it is the fear of incriminating use of the information required to be disclosed in a State prosecution which here creates the basic tension between the taxing power and the privilege.[28]

Accordingly, as in *Murphy*, there is here an apparent inter-jurisdictional clash of policies. Nor is it a meaningful difference to say that here, unlike in *Murphy*, which involved State compulsion, Congress could have enacted an immunity statute barring State as well as federal prosecution of unlawful gambling activity. By the same token, the Court in *Murphy* could have upheld the claim that the State was without authority to compel the testimony and left it to Congress to fashion an immunity statute of sufficient breadth to protect against federal prosecution. This it did not do.[29] Instead—and for the express reason that the State had a vital interest in the exer-

---

[28] Federal legislation, as noted in our *Costello* brief (p. 19, n. 17), prohibits only certain interstate aspects of gambling in specified circumstances. Hence, a person who operates a wagering business within a single State is in no apparent danger of federal prosecution as a result of paying the occupational and excise taxes and filing the required forms. And presumably under the *Sullivan* rationale, as interpreted in *Albertson* (382 U.S. at 79), if the gambling activity is carried on in more than one State, the defendant might refuse to note that fact on the forms that he files.

[29] While the Court set aside the judgment of civil contempt and remanded in *Murphy*, it did so because, at the time of the refusal to answer, that refusal was based on the correct view that the answers could be used in a criminal prosecution in the federal courts. The Court simply restored the parties to the status existing before the refusal (see 378 U.S. at 79-80; see also note 39, *infra*).

cise of its investigatory and law-enforcement functions—the Court there adopted a rule sanctioning the compulsion of needed information and prohibiting only its subsequent incriminatory use. The federal interest in securing information for tax collection purposes is patently of no lesser significance.

Moreover, when Congress adopted the wagering tax statutes in 1951, it had no reason to consider the implications of a Fifth Amendment claim in terms of a potential State prosecution. At that time, *Twining* v. *New Jersey*, 211 U.S. 78, holding the Fifth Amendment inapplicable to the States, stated the governing law (see Govt. *Grosso* Br. 27-28, n. 22). Moreover, there was then little federal legislation proscribing the interstate aspects of gambling. Hence, the fact that no mention was made of this matter in the debates or committee reports leading up to the adoption of the wagering tax laws simply reflects that, in light of the then-prevailing law, there was no sound reason for Congress to concern itself with any possible Fifth Amendment implications. And, while it is true that Congress provided that payment of the wagering taxes "shall not exempt any person from any penalty" under federal or State law for engaging in the activity being taxed (26 U.S.C. 4422), this was simply in recognition of the established principle that Congress does not have to legalize an unlawful business in order to tax it (see cases cited in note 18, *supra*). Inclusion of Section 4422 does not suggest a congressional preference for holding a taxing statute unconstitutional as opposed to application of a judicially framed exclusionary rule (see Govt *Grosso* Br. 26-27).

We stress—as we did in our *Grosso* brief last Term, (pp. 22-26)—that we are not in any way suggesting that the Court usurp the function of Congress and, in effect, adopt an immunity statute, prohibiting completely the prosecution of gamblers under State or federal law. On the contrary, and consistent with the holding in *Murphy*, our alternative argument advocates only the adoption of the rule that those authorities—State or federal—which institute a criminal prosecution of one who has complied with the wagering tax laws, relating to the underlying gambling activity, "have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence" (378 U.S. at 79, n. 18).

Nor do the practicalities of the situation preclude a showing of "an independent, legitimate source" in a subsequent gambling prosecution. As to the excise tax returns, there is little chance that they could be used as a prosecutorial lead, since the information that they require has minimal impeaching worth and the public disclosure provisions of 26 U.S.C. 6107 do not relate to such returns.[30] While the statutory disclosure provisions do relate to the registration and special occupational tax provisions, the obvious impact of the rule we alternatively urge will make it quite costly to a prosecutor who might seek to utilize such information. Simply stated, by doing so he will markedly increase his burden of showing an

---

[30] See, however, Govt *Grosso* Br. 14, n. 10, as to the limited availability of such returns, in certain circumstances, to State and local officials.

independent source for his evidence and thereby imperil the success of his prosecution. Indeed, if a prosecutor has a sufficient basis to institute a gambling prosecution wholly apart from what may be learned as a result of the gambler's compliance with the wagering tax laws—which is usually the case where State and local gambling laws are effectively enforced—he would hardly be likely to endanger his case by recourse to any such "tainted" information. Should the Court adopt a use-restriction rule in the instant cases, representatives of the Internal Revenue Service intend to initiate steps seeking congressional amendment of Section 6107 so as to exclude the occupational tax on wagering from the broad class of special taxes presently subject to a degree of mandatory public disclosure under that provision. Pending the enactment of such an amendment, the I.R.S. would, as a matter of policy, caution prosecutorial officials concerning the impact of the use-restriction rule. Similarly, the I.R.S. would, as a practical matter, exercise discretion regarding the disclosure of wagering excise tax return information so as to facilitate conformity with that rule.[31] Under such an approach, disclosures of information reported on wagering tax forms would be used only to enforce the tax measure and collect revenues due thereunder to the government. This would help ensure that infor-

[31] We do not mean to suggest that, during the interim period before amendment of Section 6107, the existence of such an administrative policy will in effect satisfy the prosecutor's obligation of showing an "independent source" for his evidence and underlying information. On the other hand, it will not be wholly irrelevant in this regard.

mation disclosed incident to compliance with the wagering tax laws will be used only for tax purposes, and would leave the gambler "in substantially the same position" as if he had not been required to disclose that information (378 U.S. at 79).[32] And, apart from these considerations, there is no occasion at this juncture to deal with such essentially evidentiary issues, the resolution of which is indicated by those cases involving application of the "taint" doctrine, *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471, 488 (see Govt *Costello* Br. 23-25; Govt *Grosso* Br. 28).

In sum, whatever may be the ultimate implications

---

[32] We recognize that such a use-restriction rule might, in some situations, effectively prevent the prosecution of a person who has complied with the wagering tax laws for certain gambling violations. Where the defendant's identity is obtained through registration or the filing of a return, and an attempt is later made to prosecute him for the underlying activity, the information disclosed may be so crucial and the lead obtained so important that prosecution would be wholly prohibited, not merely the evidentiary use of the information disclosed (cf. the concurring opinion of Mr. Justice Harlan in *Murphy*, 378 U.S. at 91, n. 7). In other words, it is possible to conceive that the effect of such an investigatory lead may not be sufficiently attentuated so that it could be shown that the evidence sought to be introduced was obtained from sufficiently independent sources. That the suggested rule might possibly, in a limited class of situations, result in immunity from prosecution does not convert it into what is essentially an immunity rule. Such a situation would occur only infrequently, if ever, since the identity of those engaged in gambling is generally not a secret to most State and local law-enforcement officials. Application of the rule in this manner might simply be occasionally necessary to ensure that appropriate protection of the privilege is consistently accorded. Compare Mansfield 165.

of *Murphy*,[33] the rule there enunciated would seem

[33] There is no merit to petitioner Marchetti's assertion (Rearg. Br. 26-27) that the Court's failure to apply a use-restriction rule last Term in *Spevack* v. *Klein*, 385 U.S. 511, undermines the reliance on such a suggested approach here. *Spevack* (in overruling *Cohen* v. *Hurley*, 366 U.S. 117) held only that a lawyer could not be disbarred for claming the privilege, where to have spoken might also have resulted in such disciplinary action, as well as in possible criminal prosecution. Indeed, there is a suggestion in Mr. Justice Fortas' concurring opinion in *Spevack* (385 U.S. at 519-520) that, if the "required records" doctrine of *Shapiro* v. *United States*, 335 U.S. 1, had been applicable—which, the Court found, it was not on the facts of that case (see 385 U.S. at 517-518)—he might be compelled to affirm a disbarment order where an attorney refused to keep pertinent records or produce them. Especially significant, in regard to *Spevack*, is the fact that Mr. Justice Fortas, whose vote was needed for a majority, specifically stated that "[i]t is quite a different matter if the State seeks to *use* the testimony given [in disciplinary proceedings] under this lash [of discharge for failure to testify] in a subsequent criminal proceeding," referring to the companion *Garrity* decision (385 U.S. at 519-520) (emphasis added). This suggests a view of *Shapiro* as imposing a use-restriction rule, at least where criminal consequences might flow from a particular disclosure.

Moreover, in *Garrity* v. *New Jersey*, 385 U.S. 493, a companion case to *Spevack*, where the Court found a violation of the privilege in requiring a policeman to confess his criminal guilt under the threat that if he did not speak he would lose his job, the Court also intimated that it was adopting a use-restriction rule. See Note, 76 Yale L.J. 839, 847, n. 41 (1967); cf. *Spevack* v. *Klein*, 385 U.S. at 516, n. 3; see also the dissenting opinion of Mr. Justice White, 385 U.S. at 531-532. Indeed, the holding in *Garrity* was that the privilege "prohibits *use* in subsequent criminal proceedings of statements obtained under threat of removal from office * * *" (385 U.S. at 500). (emphasis added). Thus, the precise vice found there by the Court was not compulsion—but use of potentially incriminating information.

plainly applicable to the instant cases, if *Kahriger* and *Lewis* are not followed. There is no need to strike down a taxing statute on Fifth Amendment grounds when a fair accommodation—embodied in a use-restriction rule—is available to sustain the federal authority in this crucial area and at the same time protect against any inroads on basic rights protected by the privilege against self-incrimination.

IV. The Government Does Not Contend That the Obligation to Pay the Special Occupational Tax and the Wagering Excise Tax Can Be Satisfied Without Filing the Required Registration Statement and Tax Return

As our foregoing arguments have emphasized, it is our view that the filing of prescribed reports—whether registration statements to accompany payment of occupational taxes, or returns to accompany payment of excise taxes—is essential to the workability of our self-reporting system of taxation. Moreover, this is so whether the Court reaffirms the rulings in *Kahriger* and *Lewis*, or adopts our alternatively suggested use-restriction rationale. We now turn more directly to the Court's second inquiry, as to the kind of information which, in the government's view, must be filed coincidentally with payment of the special occupational tax and the ten-percent excise tax on wagering. Since there are somewhat different considerations involved with regard to each of these tax obligations, we deal with them separately.

As to the registration statement involved in *Marchetti*, Congress made it plain that every person liable for the fifty-dollar occupational tax, under 26 U.S.C. 4411, "shall register" as provided for under

26 U.S.C. 4412. As we pointed out in our *Grosso* brief last Term (p. 14, n. 10), payment of the special occupational tax and registration are accomplished together through the filing of a single registration form (Form 11-C; contained in Govt *Costello* Br. App.). This form requires information, *inter alia*, as to the name, alias, or trade name (if any), address and location of the business of one who proposes to enter the wagering business and is therefore liable for the special tax. In our view, the minimal information thus requested is essential to a proper effectuation of the taxing power in the circumstances. Just as the payment of the special tax is an "integral part" [34] of the plan for collection of the excise tax on wagers, so the registration provisions are directly related to the enforcement and collection of both taxes. It unquestionably facilitates the collection of a tax on a business to have the person therein engaged specify his name, address and place of business and the names and addresses of the persons who carry on the business for him or for whom he carries on the business. This is particularly true of the gambling business, where there would otherwise be no independent information as to the place where the business is being conducted. Such elementary information is, as Congress recognized,[35] necessary for the collection of the

---

[34] H. Rep. No. 586, 82d Cong., 1st Sess., p. 60.

[35] See, *e.g.*, S. Rep. No. 781, 82d Cong., 1st Sess., p. 118. As noted by petitioners (*Marchetti* Rearg. Br. 20; *Grosso* Rearg. Br. 23), several court decisions (*e.g.*, *United States* v. *Mungiole*, 233 F. 2d 204 (C.A. 3)) reflect that it is the Commissioner of Internal Revenue's policy not to accept

excise tax (see Govt *Costello* Br. 9-10, 16). Like other numerous registration provisions upheld by this Court, this provision is "obviously supportable as in aid of a revenue purpose." *Sonzinsky* v. *United States*, 300 U.S. 506, 513. In short, if the occupational tax is a lawful exercise of the taxing power, the registration requirement is a proper and necessary incident of that tax.

Similarly, as to the wagering tax return involved in *Grosso*, it is quite clear that it was the congressional judgment that a completed return form (Form 730, set out in Govt *Grosso* Br. App.) be filed along with payment of the ten-percent excise tax.[36] In our *Costello* brief last Term (pp. 22-23, n. 21), we suggested a possible distinction between the *filing* of a registration statement and a wagering tax return, and the *payment* of the wagering excise tax, noting that payment of that tax might be effectuated "through means not necessarily having an incrimina-

---

payment of the occupational tax unless the taxpayer furnishes the information required on the registration form, and hold that a tendered but rejected payment is no defense to a subsequent non-payment prosecution. A similar policy obtains regarding payment of the ten-percent excise tax, *i.e.*, the prescribed form must accompany payment or the money is not accepted. In short, in the language of *Albertson* (382 U.S. at 78), "nothing in the Act or regulations permit less than literal and full compliance with the requirements" for filing the prescribed forms.

[36] Under 26 U.S.C. 6011 Congress has required that a return "shall" be filed, when so provided for by regulation. Under Treas. Reg. 44.6011(a)-1(a), a monthly tax return is required to be filed by those who must pay the wagering excise tax under 26 U.S.C. 4401.

tory potential." [37] On further reflection, however, we have concluded that an excise tax return must be filed along with and accompany payment of the tax. It is the considered judgment of the responsible administrative officials—and presumably Congress as well—that this is the only rational way in which such an excise tax can be effectively administered in an orderly fashion. At the very least, the name and address of the person paying the tax is essential to serve this end. If such information is required, there is no sound reason why the taxpayer should not also be required, in the monthly return, to list the gross amounts of wagering receipts upon which the tax is figured. In short, our answer to the Court's second questions in the reargument orders is that neither the obligation to pay the special occupational tax nor the wagering excise tax can be satisfied, in the govern-

---

[37] We did note, in our *Grosso* brief last Term (p. 19, n. 14), that the appropriate return, or "at least some identification of the taxpayer," must be provided along with payment to permit effective tax administration. Form 730 is the return form currently prescribed for completion along with the required monthly payment of the wagering excise tax, and relates to that tax alone. There is no reason why, as an administrative matter, a general excise tax return form (such as Form 720, although that form is for a number of excise taxes required to be paid quarterly) might not be prescribed for the wagering excise tax, if the use of such a less specific and more neutral form would be regarded as having a significantly less incriminatory potential. Nevertheless, the return form presently prescribed and in use is Form 730, and it is our position that, under current regulations and practice, that form, properly filled out, must accompany payment of the ten-percent wagering excise tax.

ment's view, without the filing of the prescribed registration and return forms.[38]

CONCLUSION

For the reasons stated herein and in our briefs of last Term, the judgments of the courts of appeal should be affirmed in both the *Marchetti* and *Grosso* cases.[39]

RALPH S. SPRITZER,
Acting Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

FRANCIS X. BEYTAGH, JR.,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

SEPTEMBER 1967.

---

[38] Since we take the view that a return form must accompany payment of the wagering excise tax, there is no occasion to consider the second part of the Court's second question in its reargument order in *Grosso* (see *supra*, p. 4).

[39] For a discussion of the reasons why, in our view, the convictions here should be affirmed even if the Court declines to adhere to *Kahriger* and *Lewis* and instead adopts our suggested use-restriction approach, we refer the Court to our briefs of last Term in *Costello* (pp. 25-26) and *Grosso* (pp. 28-29).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 276616 242

LIBRARY
SUPREME COURT U. S.

OCT 4 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 12

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR PETITIONER

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

Attorneys for Petitioner

SMITH BROS. CO. INC., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

PAGE

Summary of Argument 2

Argument:

I. Matters On Which the Parties Are Agreed 4

II. Matters on Which the Parties Disagree .. 5

A. The Present Vitality of *Kahriger* and *Lewis* 5

B. Accommodation of the Taxing Power and the Privilege 11

C. Disposition of This Case if a Use Restriction Should Be Adopted 18

D. The Communications with the Jury .. 20

Conclusion 22

TABLE OF CITATIONS

CASES

Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965) 5, 6, 8, 14, 16

Bouie v. City of Columbia, 378 U.S. 347 (1964) 18

Chapman v. California, 386 U.S. 18 (1967) 20

Counselman v. Hitchcock, 142 U.S. 547 (1892) 12

Gillespie v. United States, 368 F.2d 1 (8th Cir. 1966) 14, 17

Gould v. Argiro, 422 Pa. 433, 220 A.2d 654 (1966) 20

Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936) 10

Johnson v. New Jersey, 384 U.S. 719 (1966) 19

Johnson v. United States, 318 U.S. 189 (1943) 20

Kersey Mfg. Co. v. Rozic, 422 Pa. 564, 222 A.2d 713 (1966) 20

Knowlton v. Moore, 178 U.S. 41 (1900) 10

Lewis v. United States, 348 U.S. 419 (1955) .. 2, 5, 6, 11

License Tax Cases, 5 Wall. 462 (1867) 10

McCray v. Illinois, 386 U.S. 300 (1967) 14

McCray v. United States, 195 U.S. 27 (1904) 10

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) 9, 13, 15, 16

Table of Citations.

CASES

	PAGE
Raley v. Ohio, 360 U.S. 423 (1959)	18
Shapiro v. United States, 335 U.S. I (1948)	4
Stevens v. Marks, 383 U.S. 234 (1966)	13, 18
Stovall v. Denno, 388 U.S. 298 (1967)	19
United States v. Chandler, ... F.2d .... (2d Cir. 1967)	15
United States v. Kahriger, 345 U.S. 22 (1953)	2, 5, 6, 11
United States v. Ross, 374 F.2d 227 (6th Cir. 1967)	14, 17
United States v. Sullivan, 274 U.S. 259 (1927)	2, 4, 5, 12
United States v. Whiting, 311 F.2d 191 (4th Cir. 1962)	14
Yarsunas v. Boros, 423 Pa. 364, 223 A.2d 696 (1966)	20

STATUTES

18 U.S.C. § 1084	17
§ 1406	13
§ 1952	17
§ 2424(b)	13
§ 3486(c)	13
26 U.S.C. § 4401	4
§ 4422	16
§ 5821	10
Act of Jan. 18, 1815, c. 23, § 1, 3 Stat. 186	10

MISCELLANEOUS

Federal Offenders in the United States District Courts	19
Lipton, Record Keeping and the Privilege Against Self-Incrimination, N.Y.U. 14th Ann. Inst. on Federal Taxation 1331 (1956)	12
Mansfield, The Albertson Case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103	7, 8

NO. 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

It is always with reluctance that counsel impose a reply brief upon this Court, but in this case there have been relevant developments since petitioner submitted his original brief in November, 1966.* In particular, it is thought that it may be helpful to the Court to identify those matters on which the parties, as shown by their various briefs, now agree, and thus to isolate those issues on which the parties continue to disagree.

*Counsel were advised by the Clerk that the Brief for the Petitioner on Reargument (hereafter Pet. Rearg. Br.) "should merely cover the additional questions raised by the Court's order," and the brief filed in August is so limited.

SUMMARY OF ARGUMENT

The parties agree that the "required records" doctrine has no direct bearing on this case, and that the excise tax here in question cannot be paid without filing Form 730, the prescribed form for that tax. They further agree that this case is not controlled by *United States v. Sullivan*. Finally, they agree that the power of the government to tax and the privilege of the individual not to incriminate himself are both important constitutional provisions, and should be read in such a way that one does not destroy the other.

The parties disagree on the continued vitality of *United States v. Kahriger* and *Lewis v. United States*. Although those decisions are not directly in point with regard to the excise tax, the rationale the United States now finds in those cases would be, but the rationale — that there is no compulsion since gambling is a voluntary act — is thought unsound by petitioner. The argument advanced by the United States that a tax of this kind on gambling is valid, but that a tax on robbers or kidnappers would not be since the latter are not a business, ignores the reality of organized crime and puts an unjustified limitation on the taxing power by purporting to limit it to businesses.

The parties disagree also on how the accommodation should be made between the taxing power and the privilege against self-incrimination. The use-restriction proposed by the United States is only one possible way of making this accommodation, it is an undesirable way of doing it, and in any event the choice is properly for Congress rather than this Court. Even if the Court could properly adopt the use-restriction, petitioner con-

tends that reversal would be required in the present case since such a restriction did not exist when petitioner failed to pay the tax here involved, and at that time he was correct in supposing that payment of the tax could be used to incriminate him.

Finally the parties continue to disagree on whether reversal is required because of the communications between the trial judge and the jury outside of the presence of defendant and his counsel.

ARGUMENT

I. Matters On Which The Parties Are Agreed

On the two questions on which the Court asked discussion in its order granting reargument the parties are in complete agreement. Petitioner and the United States agree that the "required records" doctrine of *Shapiro v. United States,* 335 U.S. 1 (1948), has no direct bearing here since the present case involves reports that are required to be filed with the government as distinguished from records that are required to be kept incident to a tax or regulatory program (Pet. Rearg. Br. 5-20; Govt. Rearg. Br. 8-12). Petitioner and the United States also agree that the obligation to pay the excise tax imposed by 26 U.S.C. § 4401 can be satisfied only by filing Form 730, the required tax return (Pet. Rearg. Br. 21-25; Govt. Rearg. Br. 37-41). It is for the Court, of course, to decide if the parties are right on these points, and we are prepared to discuss these questions at oral argument if the Court should wish us to do so, but for the present there is no issue on these matters.

The parties agree, too, that the present case is not controlled by *United States v. Sullivan,* 274 U.S. 259 (1927), and that that case involved a readily distinguishable situation (Pet. Br. 17-19; Govt. Br. 11; Govt. Rearg. Br. 24-26). The United States is concerned that a decision in favor of petitioner in the present case will lead to an attack upon *Sullivan.* Perhaps such an attack will come, given the willingness of some defendants to clutch at any straw, but it would surely not succeed. It is an easy thing for the Court, in deciding

this case, to explain why *Sullivan* is distinguishable, just as the Court did in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

Finally, petitioner agrees with the argument of the United States that an accommodation must be sought between the power to tax and the privilege against self-incrimination that will not infringe on either of these important constitutional provisions (Govt. Rearg. Br. 13). Indeed we pointed out in our initial submission (Pet. Br. 24) that a holding for petitioner here need not "have a destructive effect on the fisc." As will be seen below, the parties do disagree, however, on what a proper accommodation of these interests is.

II. Matters On Which The Parties Disagree

A. The Present Vitality of Kahriger and Lewis

We read the decisions in *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955), as holding that the occupational tax on wagering does not compel self-incrimination since that tax is prospective only. So read those precedents do not apply here, since the excise tax looks to the past rather than the future. The view that the privilege applies only with regard to past acts seems unsound (Pet. Br. 10-12) but we need not pursue the point further since at oral argument in January counsel for the government disclaimed reliance on that portion of the *Kahriger* and *Lewis* holdings.

The United States has now developed more fully (Govt. Rearg. Br. 12-26) its argument that the real basis of *Kahriger* and *Lewis* is that the decision to en-

gage in gambling is a voluntary decision, and that such a decision may be treated "as the equivalent of a non-compelled choice in terms of Fifth Amendment rights" (Govt. Rearg. Br. 23). Such a rationale, if sound, would reach the excise tax just as fully as it does the occupational tax. There are several reasons why such a rationale is unsound.

First, the United States recognizes (Govt. Rearg. Br. 26) that *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), makes it difficult to adopt the rationale it ascribes to *Kahriger* and *Lewis*. Membership in the Communist Party is voluntary. It could have been argued as forcefully there as here that if one joins the Communist Party or remains a member of it, knowing that Congress has attached the condition of registration to membership, the decision to join is "a non-compelled choice in terms of Fifth Amendment rights." This Court held, however, that registration would violate the privilege against self-incrimination. The United States undertakes to distinguish this case from *Albertson* on the ground that a registration and return requirement is valid if it serves a governmental interest separate and independent from an interest in the underlying activity as such (Govt. Rearg. Br. 14-15). This distinction is difficult to understand. The government would be precluded from requiring information if it had a legitimate interest in the activity involved, but would be allowed to require the information if it had some other incidental interest for which the information would be helpful. The information would be equally incriminating in either case. The proposition that the government can obtain incriminating information indirectly but not directly is hardly an ap-

pealing one. And the distinction seems almost purely verbal. If the governmental interest in the present case is stated as collection of revenue, this would be a "separate and independent" interest, but if it is characterized as putting a tax on gambling, would it not have to be said that the government's interest is in the underlying activity of gambling?

A second answer to the "non-compelled choice" rationale the United States now advances is provided by Professor Mansfield, on whose thoughtful article the United States has quite properly relied throughout its most recent brief. Professor Mansfield says:

> It is clear that this argument must be rejected and that the privilege cannot be considered forfeited in these circumstances because of the fact of choice. Choice is indeed a factor to which the law frequently attaches consequences, but it does so only when this will aid in achieving some end defined by policy. It does not attach consequences to choice without regard to some objective. The fact of choice alone can hardly ever be considered a sufficient explanation of a legal result. To hold that since the defendant made a choice to commit the primary offense the privilege is lost would be to abolish the privilege in one of its central applications, to abolish it in cases in which it had always historically applied, to defeat its very purpose. The evils intended to be avoided by the privilege would not in fact be avoided. Even though the defendant did make a choice in committing the primary offense, once he did so he was confronted with the dilemma whether to incriminate himself

> or run the risk of punishment for failure to do so. It is the evils and abuses that inhere in this dilemma that the privilege is intended to avoid, and these evils and abuses are not eliminated simply because of the defendant's antecedent choice. This is true even though the defendant had no right to choose as he did, no right to commit the primary offense. The privilege is designed to provide protection even for those who have chosen to commit crime.

Mansfield, *The Albertson case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information,* 1966 Sup. Ct. Rev. 103, 130-131.

Finally, as we have suggested briefly before (Pet. Br. 14), every criminal has a free choice whether to commit a crime. Every such person knows that there are laws on the books by which citizens may be subpoenaed and required to testify. Yet the "voluntary" nature of his choice to become a criminal has never been thought to defeat his privilege against being compelled to testify as to his crimes.

To this the United States offers two answers. First, it rejects the analogy because "unlike the witness called upon to testify before a grand jury or an investigative body, who cannot generally choose to appear or not, the prospective gambler can choose to gamble or not to gamble" (Govt. Rearg. Br. 23 n. 21). This misses the point. The choice is whether to engage in the primary activity, whether it be gambling, white slavery, or whatever. There is no choice whether to tell about one's conduct, whether asked on a Form 730 or by a grand jury, except to the extent that the Fifth Amend-

ment provides a choice. The Fifth Amendment should be as applicable in one case as in the other.

Second, the United States argues at some length that a decision that gamblers must register and file returns does not mean that the same requirements could be imposed on kidnappers or robbers (Govt. Rearg. Br. 16-22). The essence of the argument is that gambling is a business, kidnapping and robbery are not, and that Congress would therefore not have constitutional authority to tax kidnapping and robbery. We disagree with every part of this argument.

The suggestion that crimes such as kidnapping and robbery — or murder, prostitution, and the like — are never conducted as a "business," in the sense that gambling is, is a novel one. It is more than a mere play on words to remind the Court of "Murder, Inc." and to note that on the pages of the United States Reports there is a reference to "commercial larceny." *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 95 (1964) (concurring opinion). Every newspaper reader today is aware of the existence of organized crime, and knows that the most serious kinds of crimes are within its scope.

Even more surprising, however, is the assumption in this argument of the United States that an occupational tax or an excise tax can only be laid on those activities that have the characteristics of a business. This would be a far more drastic limitation on the taxing power than that for which petitioner here contends. The Constitution imposes no such limit, and it has long been understood that "the taxing power conferred by the Constitution knows no limits except those

expressly stated in that instrument * * *." *McCray v. United States,* 195 U.S. 27, 59 (1904); *License Tax Cases,* 5 Wall. 462, 471 (1867). Over the years Congress has many times imposed taxes on matters that have none of the characteristics of a business. A tax was placed on "household furniture kept for use" by the Act of Jan. 18, 1815, c. 23, § 1, 3 Stat. 186. The tax on the making of firearms, 26 U.S.C. § 5821(a), is expressly made inapplicable to "any person who is engaged within the United States in the business of manufacturing firearms." 26 U.S.C. § 5821(b)(1). Taxes on the transmission of wealth from the dead to the living have been upheld, *e.g., Knowlton v. Moore,* 178 U.S. 41, 56 (1900), though it can hardly be said that anyone is in the business of dying.

The sound view, it is submitted, is that except for the constitutional requirements of apportionment of direct taxes and uniformity of indirect taxes, there is no activity and no transaction that is beyond the power of Congress to tax. A particular tax may fall, however, because of other constitutional protections. A tax on the business of selling advertising would be a legitimate excise tax, but if it is so devised as to limit the circulation of information to which the public is entitled under the First and Fourteenth Amendments, the power to tax must give way to those constitutional protections. *Grosjean v. American Press Co., Inc.,* 297 U.S. 233, 250 (1936). A tax on the acquisition of property by Negroes would fall, not because Congress cannot tax nonbusiness conveyances, but because equal protection notions inherent in the Due Process Clause of the Fifth Amendment make classification in racial terms invalid. An excise tax on robberies would be bad, not because

Congress cannot tax such criminal transactions, but because there would be no way to pay the tax without self-incrimination.

For the reasons given petitioner disagrees with the United States, and believes that *Kahriger* and *Lewis* have no continuing vitality.

B. Accommodation of the Taxing Power and the Privilege

As noted earlier, we agree with the United States that an accommodation can and should be made between the power to tax and the privilege against self-incrimination. We disagree on how to do this. The United States argues alternatively that its reading of *Kahriger* and *Lewis* provides a suitable accommodation, or that a use-restriction on tax returns would do so. We have indicated why the former should be rejected, and shall indicate here why the Court should not adopt the latter.

It is true, as the United States says, that voluntary compliance accompanied by some degree of disclosure is the bedrock of our tax structure (Govt. Rearg. Br. 13). Indeed this is one of the strongest arguments against the tax here in question. "It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation." *United States v. Kahriger,* 345 U.S. 22, 36 (1953) (Jackson, J., concurring).

It is significant that the income tax is successfully administered though the privilege against self-incrimi-

nation is fully respected. The taxpayer may claim the privilege on his return if the return call for incriminating answers, *United States v. Sullivan*, 274 U.S. 259, 263 (1927), and the Treasury Department recognizes that the taxpayer's records are within the constitutional privilege. Lipton, *Record Keeping and the Privilege Against Self-Incrimination*, N.Y.U. 14th Ann. Inst. on Federal Taxation 1331 (1956). The income tax applies to money illegally obtained, and the record in this case shows that petitioner has paid a substantial income tax each year.

As the example of the income tax shows, the United States can satisfy its need for revenue without abridging the constitutional privileges of its citizens. The simplest and neatest solution would be to do without the taxes on wagering. The figures offered by the United States (Govt. Rearg. Br. 18 n. 17) show that these taxes produce at most a net revenue of $5 million per year. It would be better to do without five million dollars per year than to jeopardize the good will of the people toward their tax system by a statute that appears disingenuous.

If Congress is seriously interested in obtaining revenue from this source, there are ways it can do so without infringing the privilege against self-incrimination. Indeed the government's brief points out the possibility of using a less specific and more neutral form for the wagering excise tax (Govt. Rearg. Br. 40). If a neutral form is sufficient for the income tax, there is no apparent reason why it would not suffice for this excise tax. It is harder to see how a neutral form could be provided for the occupational tax on wagers, but this,

though a convenience for enforcing the excise tax, is hardly essential to it.

Or if Congress really wants these revenues it can do what it has done more than 40 times and provide immunity for prosecution to those who pay the tax. Congress was willing to do without prosecution under the Mann Act in order to get information from persons harboring alien women in houses of prostitution. 18 U.S.C. § 2424(b). If there is a real possibility of obtaining $5 billion in annual revenue (Govt. Rearg. Br. 17 n. 16), Congress might think this justified interfering with state prosecution of gamblers. Congress makes a similar choice whenever it enacts an immunity statute broad enough to bar a state prosecution of a person, as in such statutes as 18 U.S.C. §§ 1406, 3486(c).

Finally there is the possibility that Congress might enact a restriction on the use of information provided in connection with these taxes. For the present we assume that such a use-restriction would be constitutional under the test of *Counselman v. Hitchcock,* 142 U.S. 547, 585 (1892). Compare *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 79 (1964), with *Stevens v. Marks,* 383 U.S. 234, 244-245 (1966). Few things in life come without a price — and the price of such a use-restriction is higher than the argument for the United States would make it appear. The use-restriction for which the United States contends would of course bar admission into evidence of the federal tax return. Critical questions would then be raised about whether the federal return can be used as an investigatory lead, and, if so, whether it was so used in a particular case. The first question would seem to be an-

swered, despite the government's noncommittal view about it (Govt. Rearg. Br. 35 n. 32), by *Albertson*. The Court held insufficient the purported immunity provision there involved because "it does not preclude the use of the admission as an investigatory lead, a use which is barred by the privilege." 383 U.S. at 80. The second question would have to be litigated in every prosecution, state or federal, of a gambler. This is not met by the rather debonair argument that this would occur "only infrequently, if ever, since the identity of those engaged in gambling is generally not a secret to most State and local law-enforcement officials" (Govt. Rearg. Br. 35 n. 32). There is evidence in the reported cases that payment of the tax is today used not uncommonly as an investigatory lead. *E.g., United States v. Ross,* 374 F.2d 227 (6th Cir. 1967); *Gillespie v. United States,* 368 F.2d 1 (8th Cir. 1966); *United States v. Whiting,* 311 F.2d 191 (4th Cir. 1962). Adoption of a use restriction would have several possible consequences. Prosecution of gamblers, already sporadic, would decrease, because of the difficulty of showing that the federal tax payment was not the investigatory lead. Either the prosecutor would not have to disclose the identity of his informants, in which case the protection to the defendant would be meaningless, or he would be required to make such disclosure, in which case there would be great reluctance to prosecute. Cf. *McCray v. Illinois,* 386 U.S. 300 (1967). The temptation to law enforcement officials to lie about whether they used the tax payment as an investigatory lead would be very great. A use-restriction may be justifiable in the *Murphy* context for there "the very fact that a witness is called in a state crime investigation is likely to be based

upon knowledge, or at least a suspicion based on some information, that the witness is implicated in illegal activities, which knowledge and information are probably available to federal authorities." 378 U.S. at 102 (concurring opinion). By hypothesis there is already an investigatory lead, else the state would not be interested enough in the testimony to provide immunity. No such circumstances exists with regard to the person required to come forward and pay the federal wagering tax. Congress might well think that the possible revenues to be expected from taxes on wagers do not justify a procedure that would: (1) bar state and federal prosecution of gamblers in many cases; (2) make such prosecutions more time-consuming and difficult in all cases; and (3) invite perjury by law enforcement officials in some cases, and claims of such perjury in many more cases.

These considerations lend force to the view we have advanced throughout this case that if a use-restriction rule is to be adopted, it is for the Congress, and not for the Court, to adopt it (Pet. Br. 26-27; Pet. Rearg. Br. 20). There is more than one way in which Congress could provide for taxing wagers without requiring self-incrimination, if Congress should choose to do so. The choice among these methods is properly for the Congress. It alone knows how much it wants this revenue, and to what extent it is prepared to interfere with the prosecution of gamblers, and to exercise its constitutional supremacy, to achieve that end.

In that respect this case differs markedly from *Murphy*. As pointed out by the Second Circuit in *United States v. Chandler*, ... F.2d .... (2d Cir. 1967)

(quoted in *Marchetti* Rearg. Br. 27-28), *Murphy* "dealt with the problems of adjustment in federal-state relationships when incriminating testimony is compelled under a state immunity statute. No such statute, state or federal, is invoked here * * *." The present problem is not confined to state-federal relationships, and there is no statute purporting to provide any degree of immunity. Indeed to the extent Congress has spoken it has said, in 26 U.S.C. § 4422, that it does not want any immunity to be given. In *Murphy* a state wanted information enough that it was willing, so far as it could, to grant immunity under its statutory procedure. This Court undertook to devise a rule that would respect the constitutional privilege of the witnesses without, on the one hand, frustrating the state's desire, or, on the other, disrupting enforcement of federal criminal laws.

If it is appropriate for this Court to devise a use-restriction to save an otherwise unconstitutional statute, then *Albertson* would have been a more appropriate case than is the present case in which to do so. In the statute involved in *Albertson* Congress had attempted to provide immunity, but had not gone far enough in this direction to give complete protection from all the perils against which the constitutional prohibition was designed to guard. It would have been easier for the Court to take the additional step and restrict the use of the fruits of the registration statement there, thus carrying out the apparent congressional purpose, than it is for the Court to devise a use restriction and read it into a statute that gives no hint than Congress intended any restriction of any kind.

The United States asserts that it is fear of use in a state prosecution that here creates the basic tension

between the taxing power and the privilege (Govt. Rearg. Br. 31) and that "a person who operates a wagering business within a single State is in no apparent danger of federal prosecution as a result of paying the occupational and excise taxes and filing the required forms" (Govt. Rearg. Br. 31 n. 28). The facts of *United States v. Ross*, 374 F.2d 227 (6th Cir. 1967), petition for certiorari pending, No. 77, O. T. 1967, raise doubt about this. Ross had dutifully bought his wagering tax stamp and paid the excise tax on the wagers he took in. Two FBI agents, "knowing that the appellant had a Federal Wagering Tax Stamp, went to his residence to interview him with respect to gambling." 374 F.2d at 229. He was not home, but as the agents walked across the rear of his lot they found in an overturned garbage can a publication that he had received in the mail from Chicago in which there were schedules of football games played during the latter part of December and the early part of January. He was convicted of using a facility in interstate commerce to facilitate the carrying on of gambling, in violation of 18 U.S.C. § 1952, and was fined $5000 and put on probation for two years. His conviction was affirmed by the Sixth Circuit. The facts in *Gillespie v. United States*, 368 F.2d 1 (8th Cir. 1966), are similar, if somewhat less extreme, but the convictions there, under § 1084 of the Criminal Code as well as § 1952, were set aside because the initial search by state authorities, from which the federal prosecution stemmed, was based on an insufficient showing of probable cause. With cases like these on the books, and they do not stand alone, the claim that a person who operates within a single state "is in no apparent danger of federal prosecution" must be meant in a Pickwickian sense.

If, as we contend, the existing statutory scheme with regard to the wagering excise tax compels self-incrimination, and is unconstitutional for that reason, there are ways by which the statute can be amended to collect the tax without compelling self-incrimination, but the choice of how this should be done, if at all, is properly for the legislative branch of government.

C. Disposition of This Case If a Use Restriction Should Be Adopted

When this case, and its companion case, were here last term, the United States made a very brief argument for the proposition that the convictions in these cases should stand even if the Court should hold that the statute can be saved only by reading into it a restriction on use of the incriminating information. (Govt. Br. 28-29; Govt. *Costello* Br. 25-26). The United States adheres to that view in its latest brief (Govt. Rearg. Br. 41 n. 39) though it simply refers to its earlier briefs to support its position.

Petitioner does not believe, as has been indicated, that it would be appropriate for this Court to adopt a use restriction to save this statute, but contends that even if it were, reversal would be required in this case. We will not repeat what we have said before (Pet. Br. 28-29), relying on *Raley v. Ohio,* 360 U.S. 423, 426 (1959), and *Bouie v. City of Columbia,* 378 U.S. 347, 352 (1964). We would add to those authorities reference to *Stevens v. Marks,* 383 U.S. 234, 246 (1966). If, as there held, a witness has a constitutional right to stand on the privilege until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to

him, and "a declaration that there was a valid immunity uttered for the first time on appeal would come too late," *ibid.*, the same thing should be true of a taxpayer convicted of "willful failure" to file an incriminating return.

That petitioner's conviction should be reversed if, at the time he failed to pay the taxes in question, payment would have been incriminating and there were no restrictions on use of the evidence of payment seems a minimum consequence "of the necessity that constitutional adjudications not stand as mere dictum." *Stovall v. Denno,* 388 U.S. 293, 301 (1967). Indeed we perceive no logical basis for failing to extend such a holding to all persons subject to this tax who were similarly circumstanced. To do so would not "seriously disrupt the administration of our criminal laws" nor require the "release of numerous prisoners." See *Johnson v. New Jersey,* 384 U.S. 719, 731 (1966). Statistics published by the Administrative Office of the United States Courts, of which this Court may properly take judicial notice, suggest that the dimension of the problem is very small. The following figures are for the combined fiscal years 1964 and 1965, the latest years available, and are taken from the publication, *Federal Offenders in the United States District Courts 1964,* pp. 30-31, and *ibid., 1965,* pp. 84-85. Of the 1598 persons convicted in federal courts in those two years of wagering tax violations, 1379 received either a suspended sentence, a fine, or probation, and only 219 were given jail sentences. The jail sentences of 150 offenders were for six months or less, and 56 other defendants received sentences ranging from seven to twelve months. Only 13 persons, then, were sentenced for more than one year. Of these 11 sentences were for two years or less, one was between two

and three years, and one was sentenced to nine years. A decision that the statute as it stands is unconstitutional, with or without a use restriction to save it for the future, will not lead to a general jail delivery.

D. The Communication With the Jury

The United States merely refers (Govt. Rearg. Br. 3 n. 2) to its earlier brief (Govt. Br. 30-34) for its position on the separate issue involved in this case about the communications between the trial court and the jury in the absence of defendant and his counsel. We are also content to stand on our earlier arguments (Pet. Br. 29-39) save for brief reference to two intervening developments.

The decision in *Chapman v. California,* 386 U.S. 18, 24 (1967), that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt" strengthens petitioner's position on this aspect of the case. The *Chapman* rule might not apply if "the objection did not appear in the motion for new trial or in the assignments of error" and were presented on appeal as "a 'mere afterthought,'" *Johnson v. United States,* 318 U.S. 189, 201 (1943), but that is not this case.

The Court may also wish to take note of three recent decisions of the Supreme Court of Pennsylvania: *Gould v. Argiro,* 422 Pa. 433, 220 A.2d 654 (1966); *Kersey Mfg. Co. v. Rozic,* 422 Pa. 564, 222 A.2d 713 (1966); *Yarsunas v. Boros,* 423 Pa. 364, 223 A.2d 696 (1966). In these three decisions the Pennsylvania court has adopted the rule, even for civil cases, that communication between court and jury outside the presence of

counsel requires reversal without more. It adopted this attitude because prejudice is always possible from such communications but the existence of prejudice cannot be demonstrated, and because experience had shown the need for firm guidelines for trial judges in this sensitive area of judge-jury relations. State decisions are, of course, not authoritative here but these three cases are of interest as showing that petitioner's argument on this issue is not reliance on some ancient technicality but on a right regarded by a modern court as fundamental.

CONCLUSION

For the reasons set out here, and in petitioner's earlier briefs, the judgment below should be reversed, with instructions to dismiss the indictment as to counts 1 to 4 and 6 to 17 and to grant a new trial on counts 20 to 23.

Respectfully submitted,

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219
CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Attorneys for Petitioner

September, 1967

SUPREME COURT, U. S.
NO. ~~181~~ 12
NOV 16 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966 7

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219
Attorney for Petitioner

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Of Counsel

SMITH BROS. CO. INC., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Constitutional and Statutory Provisions Involved .. 2

Statement of Case 3

Summary of Argument 6

Argument:

I. Payment of the Excise Tax on Wagers Requires the Taxpayer to Incriminate Himself, Contrary to His Constitutional Privilege 8

II. The Fifth Amendment Objections to the Excise Tax Require Reversal of the Conviction 25

III. The Conviction Should Be Reversed Because the Communications Between the Court and Jury in the Absence of Petitioner and His Counsel Have Not Been Shown Not to Be Prejudicial 29

Conclusion 39

Appendix — Constitutional and Statutory Provisions Involved 40

TABLE OF CITATIONS

CASES

Acklen v. State, 196 Tenn. 314, 267 S.W.2d 101 (1954) 20

Adams v. Maryland, 347 U.S. 179 (1954) 26

Ah Fook Chang v. United States, 91 F.2d 805 (9th Cir. 1937) 35, 38

Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965) 6, 9, 16, 18, 26

CASES PAGE

Arrington v. Robertson, 114 F.2d 821 (3d Cir. 1940) 33

Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) . . 23

Barenblatt v. United States, 360 U.S. 109 (1959) . . . 23

Bihn v. United States, 328 U.S. 633 (1946) 34

Bouie v. City of Columbia, 378 U.S. 347 (1964) 28

Boynton v. State, 75 So.2d 211 (Fla. 1954) 13, 22, 23

Brasfield v. United States, 272 U.S. 448 (1926) 32

Brown v. Walker, 161 U.S. 591 (1896) 24

Combs v. Snyder, 101 F.Supp. 531 (D.D.C. 1951) . . . 16

Commonwealth v. Fiorine, 202 Pa. Super. 88, 195 A.2d 119 (1963) 20

Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961) 18

Costello v. United States, No. 41, O. T. 1966. . . . . .12, 15, 25, 28

Counselman v. Hitchcock, 142 U.S. 547 (1892) 26

Deitch v. City of Chattanooga, 195 Tenn. 245, 258 S.W.2d 776 (1953) 20

Dugan v. United States, 341 F.2d 85 (7th Cir. 1965) 13

Estes v. United States, 335 F.2d 609 (5th Cir. 1964) 35

Evans v. United States, 284 F.2d 393 (6th Cir. 1960) 33

Ferrari v. United States, 244 F.2d 132 (9th Cir. 1957) 34

Fillippon v. Albion Vein Slate Co., 250 U.S. 76 (1919) 30, 32

Fina v. United States, 46 F.2d 643 (10th Cir. 1931) 35

Hoffman v. United States, 341 U.S. 479 (1951) . . .8, 9, 11

Irvine v. California, 347 U.S. 128 (1954) 20, 27

CASES PAGE

Jenkins v. United States, 380 U.S. 445 (1965) 39

Jones v. United States, 299 F.2d 661 (10th Cir. 1962) 35

Kotteakos v. United States, 328 U.S. 750 (1946) ... 36

Lewis v. United States, 146 U.S. 370 (1892) 29, 30

Lewis v. United States, 348 U.S. 419 (1955) 6, 10, 12, 13, 14, 15

Little v. United States, 73 F.2d 861 (10th Cir. 1934) 35, 38, 39

McCandless v. United States, 298 U.S. 342 (1936) 34

Malloy v. Hogan, 378 U.S. 1 (1964) 9

Mattox v. United States, 146 U.S. 140 (1892) .. 29, 30, 34

Mullin v. United States, 356 F.2d 368 (D.C. Cir. 1966) 36

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) 26, 27

Raley v. Ohio, 360 U.S. 423 (1959) 28

Ray v. United States, 114 F.2d 508 (8th Cir. 1940) 35

Rice v. United States, 356 F.2d 709 (8th Cir. 1966) 35

Russell v. United States, 306 F.2d 402 (9th Cir. 1962) 13, 17

Schmerber v. California, 384 U.S. 757 (1966) 9, 17

Shields v. United States, 273 U.S. 583 (1927) 30, 31, 32, 33

State v. Curry, 92 Ohio App. 1, 109 N.E.2d 298 (1952) 20

State v. Mills, 229 La. 758, 86 So.2d 895 (1956) 20, 21, 23

Ullmann v. United States, 350 U.S. 422 (1956) .. 11, 24, 26

CASES	PAGE
United States v. Ansani, 138 F. Supp. 451 (N.D. Ill. 1955)	13
United States v. Compagna, 146 F.2d 524 (2d Cir. 1944)	35
United States v. Costello, 352 F.2d 848 (2d Cir. 1965)	15
United States v. Forrester, 105 F. Supp. 136 (N.D. Ga. 1952)	27
United States v. Kahriger, 345 U.S. 22 (1953)	6, 10, 11, 12, 13
United States v. Mungiole, 233 F.2d 204 (3d Cir. 1956)	16
United States v. Neal, 320 F.2d 533 (3d Cir. 1963)	32
United States v. Sullivan, 274 U.S. 259 (1927)	17, 18
United States v. Whiting, 311 F.2d 191 (4th Cir. 1962)	16, 23
United States v. Woodner, 317 F.2d 649 (2d Cir. 1963)	32, 35
United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964)	8, 20
Walker v. United States, 322 F.2d 434 (D.C. Cir. 1963)	35
Wheaton v. United States, 133 F.2d 522 (8th Cir. 1943)	35, 39
Williams v. United States, 338 F.2d 530 (D.C. Cir. 1964)	36

STATUTES AND RULES

United States Constitution, Amendment V 40
United States Constitution, Amendment VI 40
15 U.S.C. § 1173 13
18 U.S.C. § 371 3
18 U.S.C. § 1084 8
18 U.S.C. §§ 1301-1305 8
18 U.S.C. § 1406 24
18 U.S.C. § 1952 8
18 U.S.C. § 1953 8
18 U.S.C. § 2424(b) 24
18 U.S.C. § 3486 24
26 U.S.C. § 4401 ..... 2, 3, 9, 12, 16, 17, 23, 40, 41
26 U.S.C. § 4411 ..... 3, 8, 10, 12, 15, 27
26 U.S.C. § 4412 ..... 8, 10, 12, 15, 27
26 U.S.C. § 4422 ..... 7, 24, 27, 28, 41
26 U.S.C. § 4901(c) 20, 21
26 U.S.C. § 6001 16
26 U.S.C. § 6011 16
26 U.S.C. § 6107 ..... 20, 21, 41
26 U.S.C. § 7203 15
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2111 34
Fed R. Crim. Proc. 43 ..... 29, 42
Fed. R. Crim. Proc. 51 ..... 31, 42
Treas. Reg. § 44.6011(a)-1(a) 12, 16, 42
18 Pa. Stat. § 4601 8
18 Pa. Stat. § 4603 8

Miscellaneous.

MISCELLANEOUS

Caplin, The Gambling Business and Federal Taxes, 8 Crime and Delinquency 371 (1962) 21

Comment, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L.J. 1568 (1963) 25, 26, 27

McCormick, Evidence (1954) 17, 37

Morgan, The Privilege against Self-Incrimination, 34 Minn. L. Rev. 1 (1949) 11

Note, Required Information and the Privilege Against Self-Incrimination, 65 Col. L. Rev. 681 (1965) 12

Note, The Fifth Amendment and the Federal Gambling Tax, 5 Duke L.J. 86 (1956) 12

Rec. Dec., 43 Geo. L.J. 676 (1955) 12

Rec. Dec., 29 N.Y.U.L. Rev. 217 (1954) 12

Rec. Dec., 41 Va. L. Rev. 103 (1955) 12

Wigmore, Evidence (3d ed 1940) 11

Wigmore, Evidence (McNaughton rev. 1961) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 181

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district court denying a motion to dismiss the indictment (R. 26-28) is reported at 225 F. Supp. 161, 174. The opinion of the court of appeals (R. 113-128) is reported at 358 F.2d 154.

JURISDICTION

The judgment of the court of appeals (R. 129) was entered on March 25, 1966. A timely petition for rehearing was denied on May 3, 1966 (R. 130). The petition for a writ of certiorari was filed on May 28, 1966, and was granted on October 10, 1966. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the excise tax on wagering imposed by 26 U.S.C. § 4401 violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment?

2. Can a criminal conviction stand where there were communications between the court and the jury during the jury deliberations in the absence of petitioner and his counsel and there has been no showing that these communications were not prejudicial to the petitioner?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are printed in the Appendix, at p. 40 below.

STATEMENT OF CASE

Petitioner and three others were charged in a 26 count indictment with various violations of the wagering tax statutes and with conspiracy to defraud the government with regard to wagering taxes (R. 12-25). Petitioner's codefendants moved for a severance and this motion was granted (R. 6). Petitioner then went to trial on the 23 counts in which he was named. One count was dismissed by the court and another withdrawn (R. 7), and the jury found petitioner not guilty on one count (R. 62). He was found guilty on 15 counts involving failure to pay the excise tax on wagers required by 26 U.S.C. § 4401, on four counts of failure to pay the occupational tax on wagering required by 26 U.S.C. § 4411, and on one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. He was fined $191,000 — $1,000 on the conspiracy count and $10,000 on each of the wagering tax counts — and sentenced to one year in jail on each count, with the sentence on nine of the counts to be consecutive, and the sentences on the remaining counts concurrent with one of these nine (R. 8-10). His motion to dismiss the excise tax conspiracy counts of the indictment on the ground that payment in the required manner of the wagering excise tax called for by 26 U.S.C. § 4401 would violate his privilege against self-incrimination (R. 25) was denied (R. 26-28). This constitutional objection was preserved at the trial (R. 29-36) and raised again by motions for judgment of acquittal at the close of the government's evidence (R. 36-39), at the close of all the testimony (Tr. 2219),* and after verdict (R. 75-77).

---

*By stipulation of counsel in this Court, either party may refer in his brief and oral argument to any part of the original record not designated for printing.

The issues in this case were submitted to the jury at 4:15 p.m. on Wednesday, March 4, 1964 (R. 84). The jury deliberated until about 11:00 p.m. and resumed deliberation the following morning (R. 84). At 12:15 that afternoon counsel for petitioner was informed by the United States Attorney that at approximately 11:30 a.m. the jury had sent a note to the judge indicating that they could not agree, and the court had instructed the jury, through the bailiff, to continue deliberating (R. 84). Neither petitioner nor his lawyer were present when the note was received and the instruction given, and neither the note nor the court's reply were given to the clerk or otherwise made a matter of record (R. 70, 84-85). The jury continued to deliberate until about 11:00 p.m. on Thursday.

As the jury was preparing to return to its hotel on that Thursday night, one of the jurors became ill (R. 42). The next morning the doctor who was called to care for the sick juror reported that she could not resume deliberations for four or five hours. At a conference with the trial judge, petitioner's attorney moved for a mistrial on the ground that the illness of the juror might result "in some sort of a compromise verdict" (R. 40-41). The motion was denied, and jury deliberations were suspended until the following day. The jury resumed deliberations at 2:50 p.m. Saturday (R. 86). In a conference in chambers at which both attorneys, and the petitioner, were present, petitioner's attorney again moved for a mistrial, on the basis of information received shortly before from the doctor that the sick juror was suffering from nervous prostration and acute mental depression, and was in the need of psychiatric care (R. 53). At about 3:15 p.m., while this conference

was in progress, the bailiff brought a note to the judge, and the following colloquy ensued (R. 60-61):

The Court: This is a statement addressed to me: "I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and I feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request."

We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So, I think we will just tell them we got their message and tell them to keep on working.

Are there any further suggestions from anyone?

Mr. McLaughlin: Well, we have already moved for a mistrial.

The Court: Tell them I have got their message and I suggest they keep on working.

The Bailiff: All right.

At 8:20 p.m. on that Saturday the jury returned the verdict in the case (R. 62). The communication between court and jury was assigned as a ground for a new trial in a motion filed on Tuesday, March 10th (R. 78-84). The motion for a new trial was denied (R. 87). Appeal was taken and the conviction was affirmed by the court of appeals (R. 129).

SUMMARY OF ARGUMENT

I.

Payment of the excise tax on wagers requires the taxpayer to state in writing the gross amount of wagers accepted by him in the preceding month. Such a statement would tend to incriminate him with regard to a variety of state and federal crimes. The case is not controlled by *United States v. Kahriger,* 345 U.S. 22 (1953), and *Lewis v. United States,* 348 U.S. 419 (1955), for the occupational tax on wagering involved in those cases was considered to be prospective only, and thus beyond the reach of the privilege against self-incrimination, while the excise tax on wagers looks only to the past. The incrimination involved in the excise tax is compulsory, not voluntary, since while a person may have a free choice whether to become a gambler, he has no choice whether to pay the tax on wagers he has received. It is not possible to pay the tax without filing the return on which the incriminating information must be given, and even if it were, the mere act of payment of the tax would be communicative and incriminating. For reasons stated in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), where the requirement of a return, as here, is in an area permeated with criminal statutes, the constitutional privilege need not be claimed on the return and may be set up as a defense in a prosecution such as this one. Excise tax returns are made available to law enforcement officials, and are used to convict taxpayers of other offenses. The Fifth Amendment bars the government from compelling incriminating information, even where some valid governmental interest is served by obtaining the information.

II.

If, as argued under Point I, payment of the excise tax would require petitioner to incriminate himself, his conviction on the counts involving the excise tax should be reversed. Even if adequate protection against self-incrimination could be provided by a rule prohibiting use of information acquired in connection with collection of the tax, and the fruits of such information, in other prosecutions, such a grant of immunity is appropriately made by the legislative branch, and it would be particularly inappropriate for this Court to create such an immunity here where Congress has expressly provided that there shall be no immunity: 26 U.S.C. § 4422. In any event, such an immunity could be prospective only, and petitioner, who failed to pay the tax at a time when there was no reason to think that information given would not be used against him, should not now be punished for that failure.

III.

The communications between the jury and the court while the jury was deliberating denied petitioner his right to be present at every stage of the proceedings against him. Such communications outside the presence of a defendant require reversal unless it affirmatively appears in the record that there was no reasonable possibility of prejudice to the defendant. In this case the record does not show the exact contents of the note from the jury to the court, and it is silent as to what the bailiff said to the jury in response. It is quite possible that either or both of these communications may have been prejudicial to petitioner, and a new trial is required on this ground.

ARGUMENT

I. Payment of the Excise Tax on Wagers Requires the Taxpayer to Incriminate Himself, Contrary to His Constitutional Privilege.

If petitioner had been called before a federal or state grand jury, or other investigating body, put under oath, and asked to state the gross amount of wagers accepted by him in the preceding month, there would seem not the slightest doubt that he could properly refuse to answer on the ground that his answer might tend to incriminate him. An admission by petitioner that he had received wagers, in any stated amount, would be "a link in the chain of evidence," *Hoffman v. United States,* 341 U.S. 479, 486 (1951), by which he might be convicted of a number of state and federal crimes. Pennsylvania has statutes against lotteries and gambling, 18 Pa. Stat. §§ 4601, 4603. Federal statutes prohibit accepting wagers without having first paid the occupational tax, imposed by 26 U.S.C. § 4411, and registering, as required by 26 U.S.C. § 4412. The admission would virtually convict petitioner of having violated these statutes, and it might well also incriminate him under the racketeering statute, 18 U.S.C. § 1952. Cf. *United States v. Zizzo,* 338 F.2d 577 (7th Cir. 1964). Other federal crimes of which he might be found guilty, in part on the basis of such an admission, are 18 U.S.C. §§ 1084 (transmission of wagering information), 1301-1305 (lotteries), and 1953 (interstate transportation of wagering paraphernalia). Of course other proof would be required, in addition to petitioner's admission, to convict him of most or all of these crimes, but a brick is not a wall. An admission of having accepted wagers is

a more substantial link in the chain of proof needed to convict for various crimes than were the questions involved in *Hoffman v. United States*, 341 U.S. 479 (1951), or *Malloy v. Hogan*, 378 U.S. 1 (1964).

We do not anticipate that the United States will take issue with the conclusion stated in the previous paragraph. Yet the question hypothetically put to petitioner discussed there is precisely the question which Form 730 would have required him to answer, under penalties of perjury, had he sought to pay the excise tax on wagers imposed by 26 U.S.C. § 4401, and for nonpayment of which he now stands convicted. It is petitioner's position that he is protected as fully by the privilege against self-incrimination when the government seeks the information in connection with collection of a tax as if the government were to seek the information by asking him the question before a grand jury. "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." *Schmerber v. California*, 384 U.S. 757, 763-764 (1966). As the Court said only last term in a case with great relevance here, "if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 78 (1965).

On the analysis thus far, the conclusion would seem clear that petitioner cannot be punished for failure to pay the excise tax on wagers, or for conspiracy to avoid such payment, since to pay the tax would have forced

petitioner to be a witness against himself in a criminal proceeding, contrary to the Fifth Amendment. Against this conclusion, various arguments have been put forward by the court below or elsewhere, which we shall now consider. These arguments are: (1) this Court has already held that the wagering tax laws do not violate the privilege against self-incrimination; (2) petitioner is not compelled to incriminate himself because his decision to engage in gambling is wholly voluntary; (3) he was convicted for failure to pay the tax, not for failure to make the required return; (4) if the return calls for incriminating information, petitioner should have claimed his privilege on the return; (5) the returns are not incriminating since they are confidential; and (6) there is a valid governmental interest in collecting the tax which justifies the compulsion of incriminating information.

1. In *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955), this Court upheld, against Fifth Amendment objections, the occupational tax on wagering and the registration provision which accompanies it. 26 U.S.C. §§ 4411, 4412. If it were necessary to this case, we would be prepared to argue that *Kahriger* and *Lewis* should be overruled. The basic premise of those decisions, stated in *Kahriger*, 345 U.S. at 32, and relied on in *Lewis*, 348 U.S. at 422, is that "the privilege has relation only to past acts, not to future acts that may or may not be committed." The only authority cited by the Court for that proposition was 8 Wigmore, Evidence § 2259(c) (3d ed. 1940).

It implies no lack of appreciation of Dean Wigmore's great scholarly work to note that he was not a friend

of the privilege against self-incrimination, and that his views as to the proper breadth of the privilege must be discounted accordingly. To Wigmore the privilege "should be kept within limits the strictest possible." 8 Wigmore, Evidence § 2251, p. 318 (3d ed. 1940). But this Court has been true historically to a different canon of construction. To this Court the privilege "registers an important advance in the development of our liberty — 'one of the great landmarks in man's struggle to make himself civilized'." *Ullmann v. United States,* 350 U.S. 422, 426 (1956). The privilege therefore "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States,* 341 U.S. 479, 486 (1951).

The argument against the Court's reliance on Wigmore in *Kahriger* is more than merely *ad hominem.* Two years before the wagering taxes were enacted Professor Edmund M. Morgan made a detailed analysis of the proposition of Wigmore as to scope of the privilege on which the Court relied. Morgan concluded that only a strained and artificial understanding of a key term in Wigmore's text would "save the generalization from utter absurdity." Morgan, *The Privilege against Self-Incrimination,* 34 Minn.L.Rev. 1, 37 (1949). Without such an artificial understanding, he warned prophetically, "Wigmore's generalization would permit the destruction of the privilege in all or almost all situations by ingeniously drawn legislation." *Ibid.* The act imposing the wagering taxes, "a squeezing device contrived to put a man in federal prison if he refuses to confess himself into a state prison as a violator of state gambling laws," *United States v. Kahriger,* 345 U.S. 22, 36-37 (1953) (dissenting opinion), is just such "ingeniously

drawn legislation." Later writers have agreed with Morgan, rather than Wigmore or with this Court. So much of *Kahriger* as held the taxes involved valid as against Tenth Amendment objections has been favorably received, but the resolution of the Fifth Amendment issue in *Kahriger* and *Lewis* has produced a storm of criticism from the commentators. See Note, *Required Information and the Privilege Against Self-Incrimination,* 65 Col.L.Rev. 681, 687-690 (1965); Note, *The Fifth Amendment and the Federal Gambling Tax,* 5 Duke L.J. 86 (1956); and Rec.Dec., 29 N.Y.U.L.Rev. 217 (1954), 43 Geo. L.J. 676, (1955) 41 Va.L.Rev. 103 (1955).

We welcome the fact that the Court has agreed to consider whether *Kahriger* and *Lewis* should be overruled. *Costello v. United States,* No. 41, O. T. 1966. We consider that those decisions rest on a faulty premise which could lead to a substantial erosion of the constitutional privilege. But we need not pursue the point further, for it is clear that *Kahriger* and *Lewis* do not control this case, and that reversal should be had here whatever is decided in *Costello*. *Kahriger* and *Lewis* and *Costello* all involve the occupational tax on wagering, 26 U.S.C. §§ 4411, 4412. This case involves the excise tax on wagers, 26 U.S.C. § 4401. The Court held as it did in the two earlier cases by reading the occupational tax provisions as "wholly prospective," 348 U.S. at 422, and as relating only to acts to be performed "in the future". 345 U.S. at 33. No such reading is possible with regard to the excise tax. The excise tax is payable only on wagers which have, in the month covered by the return, actually been placed with the taxpayer. 26 U.S.C. § 4401(c); Treas. Reg. § 44.6011(a)-1(a). Lower courts have perceived clearly that the *Kahriger-Lewis* rationale has

no application where past acts are involved. The distinction was vividly presented in *United States v. Ansani,* 138 F.Supp. 451 (N.D. Ill. 1955), where the court, relying on *Kahriger,* upheld a count in an indictment charging a person with failure to register as a dealer in gambling devices, as required by 15 U.S.C. § 1173, but dismissed a count charging failure to file monthly records of sales and deliveries of such devices, as required by another portion of the cited statute, on the ground that that requirement of the statute would violate the privilege against self-incrimination. The distinction is also clearly drawn in such cases as *Russell v. United States,* 306 F.2d 402, 410 (9th Cir. 1962), and *Dugan v. United States,* 341 F.2d 85 (7th Cir. 1965).

A decision of particular interest is *Boynton v. State* 75 So.2d 211 (Fla.1954), where it was held that since payment of the excise tax is compelled by federal government, evidence of such payment must be excluded by the state privilege against self-incrimination. The court had no difficulty in distinguishing *Kahriger,* at 215: "The excise tax exacted becomes due after the purchaser has engaged in gambling. He is compelled to pay it; if he is then forced to admit it, he has no protection against self-incrimination."

2. The court below relied heavily, 358 F.2d at 164, on language in *Lewis,* 348 U.S. at 422-423, that the decision to engage in an unlawful business is a voluntary decision, and that therefore no one is compelled by the wagering tax laws to incriminate himself. To this there are three answers. First, as noted above, *Lewis* was concerned with the occupational tax, which was construed as prospective only. One who is considering entering

into the gambling business in the future may be thought to have free choice in the matter and thus free choice as to whether to pay the occupational tax. But there is no choice for the person who has accepted wagers in the past. He is compelled to pay the tax, and thus to incriminate himself, or he will be subjected, as petitioner has found, to severe penalties. Second, the language in *Lewis* about the voluntary nature of the incrimination required is quite inconsistent with the recent holding in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965). Membership in the Communist Party is voluntary. Yet the fact that Albertson could have chosen not to join the party, or could have withdrawn after he had once joined, did not prevent this Court from holding that the requirement that he register was a compulsion which violated the privilege against self-incrimination. Third, the "voluntariness" argument, if taken seriously, would destroy the privilege. If gamblers are to be said to have notice of the wagering tax laws, and to have waived any protection under the Fifth Amendment when they voluntarily enter into their illegal business, the same thing would have to be said for bank robbers, white slavers, and those who are thought to have violated any of the numerous provisions of Title 18. These people have a free choice whether to commit a crime. They know before committing it that there are laws on the books by which they may be subpoenaed and required to testify, on pain of contempt. Yet the "voluntary" nature of their choice to become a criminal has never been thought to defeat their privilege against being compelled to testify as to their crimes.

3. The United States has suggested that any possible incrimination of petitioner must be in the filing of

the return, not the payment of the tax, and points out correctly that the indictment against petitioner charges him with failure to pay the tax, rather than relying on the following clause of 26 U.S.C. § 7203 which makes it equally a misdemeanor wilfully to fail to make a return. If there is merit to this distinction, then this Court unnecessarily decided a serious constitutional issue in the *Lewis* case, for there the information contained only one count, in which Lewis was charged with failure to pay the occupational tax imposed by what is now § 4411. He was not charged with failure to register under what is now § 4412. Transcript of Record, *Lewis v. United States*, No. 203 O. T. 1954, p. 1. In the pending *Costello* case, defendant has been sentenced to prison on counts of conspiracy and of failure to pay the occupational tax, and received a suspended sentence and probation on the count charging failure to register. *United States v. Costello*, 352 F.2d 848, 849-850 (2d Cir. 1965). If the distinction now proposed is sound, this Court would have to affirm Costello's prison sentence and could at best reverse the suspended sentence and probation on the registration count.

The suggested distinction presupposes that it is possible to pay the tax without making the return and thus without giving the incriminating information called for by Form 730. Form 730 is reproduced in the Appendix at p. 43. Such law as there is reinforces the teaching of common sense that this is not possible, and that the Internal Revenue Service would not accept payment without the return. There are at least three reported cases in which it appears that the Service would not accept a tendered payment of the occupational tax when the taxpayer refused to make all the disclosures de-

manded by Form 11-C, the form used in connection with that tax. *United States v. Whiting,* 311 F.2d 191, 193 (4th Cir. 1962); *United States v. Mungiole,* 233 F.2d 204 (3d Cir. 1956); *Combs v. Snyder,* 101 F. Supp. 531 (D.D.C. 1951), affirmed 342 U.S. 939 (1952). There is no reason to suppose that the Service would behave differently if tender of the excise tax, unaccompanied by a return, were made, for in refusing to accept the tax without a return the Service was acting in compliance with applicable statutes and regulations. Thus it is provided that "every person liable for any tax * * * shall * * * make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. * * *" 26 U.S.C. § 6001. Another statute provides that when required by regulations, any person liable for a tax "shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations." 26 U.S.C. § 6011(a). The full text of Treas. Reg. § 44.6011 (a)-1 is set out in the Appendix, p. 42 below. It provides in part that "every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by §§ 44.4403-1 and 44.6001-1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. * * *" It seems apparent that here, as in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 78 (1965), "nothing in the Act or regulations permits less than literal and full compliance with the requirements of the form * * *."

Even on the quite unrealistic supposition that the Service would accept payment of the excise tax without requiring a Form 730, such a payment would be of a "communicative nature," *Schmerber v. California,* 384 U.S. 757, 761 (1966), and would be incriminating. To tender such a payment it would be necessary for the taxpayer in some way to identify the tender as being the sum due under § 4401. Such an identification would not be under oath, and is possibly less forceful than an express statement, required by Form 730, of "gross amount of wagers accepted during month." Nevertheless it would be admissible in evidence against the taxpayer, either as a "verbal act," McCormick, Evidence 463-464 (1954), or as an admission of a party opponent, *id.* at §§ 239 *et seq.* A jury could permissibly infer that no one pays the excise tax on wagers unless he has accepted wagers, and that inference would be a useful link in convicting the taxpayer of various crimes.

4. The court below relied, 358 F.2d at 164, on *United States v. Sullivan,* 274 U.S. 259, 263 (1927), for the proposition that if payment of the tax would have incriminated petitioner, he should have claimed his privilege on the return. But *Sullivan* is not apposite, for reasons which have been well stated by this Court and others. *Sullivan* involved the income tax, and the income tax return permits reporting of income without specific identification of source. Petitioner could make no return under § 4401 without admitting an actual or presumptive violation of law. Cf. *Russell v. United States,* 306 F.2d 402, 409 (9th Cir. 1962).

The limits on *Sullivan* were suggested when registration under the Subversive Activities Control Act first came before this Court:

"Tax returns must be filed generally, and answers to tax return questions may involve any of a wide variety of activities, whereas the obligation to file a registration statement compels a few particular individuals to come forward, to identify themselves, and to suggest, at least, their connection with a relatively limited potential sphere of criminal conduct. Then, too, in Sullivan, Mr. Justice Holmes assumed that some, at least, of the answers to the questions on the tax return would not have been incriminating, whereas in the case of the registration statement, any claim of the privilege would involve the withholding of all information; thus, there is, presumably, a greater governmental interest in having the privilege claimed specifically on the form in the tax-return circumstances."

Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 108-109 (1961). See also the observations on the same subject by Mr. Justice Brennan and the Chief Justice, dissenting in part, *id.* at 196.

What was said on this point in the *Communist Party* case was clearly dicta, since a majority of the Court found that the self-incrimination issue as to the registration provision was prematurely raised, and thus it was not necessary to decide whether *Sullivan* was controlling. The issue was properly raised, and had to be decided, in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965). There the views suggested by way of dictum and dissent in *Communist Party* were accepted as the law by a unanimous Court. The Court said, at 79:

"In Sullivan the questions in the income tax return

> were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime."

Gamblers, like Communists, are "a highly selective group inherently suspect of criminal activities." The wagering taxes do not reach "an essentially noncriminal and regulatory area of inquiry," as does the income tax, but involve an area "permeated with criminal statutes." It is true that there are overtones of the right of free association involved in the *Albertson* case, but the right of privacy safeguarded by the Fifth Amendment is no less important a constitutional provision than is the First Amendment. It is entirely appropriate that a witness in a judicial, legislative, or administrative proceeding be required to claim his privilege if he wishes to enjoy its benefits — although for reasons of policy this logic is not extended to criminal defendants. The witness in a proceeding is present because there is already reason to believe that he has information on the subject matter of the inquiry. His invocation of the privilege may confirm the suspicions of his interrogators, but it is less likely to arouse such suspicions for the first time than would a rule which requires all persons everywhere, known or unknown, who fall within a prescribed category, to come forward and identify themselves by invocation of the privilege.

5. There can be no doubt that information as to payment of the occupational taxes on wagering is made available to other law enforcement agencies. 26 U.S.C. § 6107 so provides in terms. Even if *Deitch v. City of Chattanooga,* 195 Tenn. 245, 258 S.W.2d 776 (1953), upholding a city ordinance making it a misdemeanor to possess a federal wagering tax stamp, is regarded, as it should be, as a sport, the fact remains that in a number of cases evidence that a defendant had paid the occupational tax was introduced in evidence against him for various purposes. *Irvine v. California,* 347 U.S. 128, 130 (1954); *United States v. Zizzo,* 338 F.2d 577, 580-581 (7th Cir. 1964); *Commonwealth v. Fiorine,* 202 Pa. Super 88, 195 A.2d 119 (1963); *State v. Mills,* 229 La. 758, 86 So.2d 895 (1956); *Acklen v. State,* 196 Tenn. 314, 267 S.W.2d 101 (1954); *State v. Curry,* 92 Ohio App. 1, 109 N.E.2d 298 (1952).

Both in the trial court and in the court below the United States took the position that the excise tax and the occupational tax are treated differently in this respect, and that excise tax returns, and the names of those who have paid such taxes, are kept confidential. We doubt whether such a difference, if it exists, is of legal significance. Presumably the protection of the Fifth Amendment extends to *in camera* proceedings as fully as to public inquiries. But for the sake of completeness, we note here our view that no such difference does in fact exist.

At the outset, we concede that 26 U.S.C. § 6107, which gives state prosecutors access to lists of those who have paid special taxes, applies to the occupational tax but not to the excise tax, since by definition, 26

U.S.C. § 4901(c), a "special tax" is one the payment of which is evidenced by a stamp. So far as we can find, no statute or regulation reaches the question of whether wagering tax returns are confidential or for public use. We note also that a government witness testified at the trial that no record is available to the general public of those who have paid the excise tax (R. 101-102). The confidential nature of such returns was made less clear by the willingness of the United States Attorney at the trial to make available to defense counsel for examination the excise tax returns for all persons in the district who had paid such taxes during a period of three years. (Tr. 1556-1558) And it is interesting to observe that Mortimer M. Caplin, writing at a time when he was Commissioner of Internal Revenue, stated that "the Internal Revenue Service makes available to [local] agencies the names and addresses of those who have paid wagering taxes." Caplin, *The Gambling Business and Federal Taxes,* 8 Crime and Delinquency 371, 372 (1962). Commissioner Caplin further said that the District Directors were required by law to maintain for public inspection a list of all persons "who have paid certain 'special taxes.' This includes both the excise and the occupational taxes on wagering." *Id.* at 375. Perhaps Commissioner Caplin had forgotten 26 U.S.C. § 4901(c), and was mistaken in his belief that the excise tax is a "special tax" within 26 U.S.C. § 6107.

But this point is not one which needs to be resolved by speculation, for there is incontrovertible evidence, of which this Court may properly take judicial notice, that excise tax payments have not been kept confidential. In *State v. Mills,* 229 La. 758, 86 So.2d 895 (1956), forms

which plainly were copies of Form 730 were introduced in evidence against the defendant. That they were Form 730 is evident from the description by the Louisiana court that "the returns show that Mills was engaged in the business of accepting wagers on his own account, and show the amount of wagers accepted during each month of the period covered and the amount of tax due to the federal government." 229 La. at 771, 86 So.2d at 899-900. The copies offered "were certified by the custodian of the originals, an officer of the United States Treasury." 229 La. at 782, 86 So.2d at 903. The defendant had objected to admission of these documents on the ground that they were confidential and privileged, and this objection was expressly rejected by the state Supreme Court. 229 La. at 779, 86 So.2d at 902. In *Boynton v. State,* 75 So.2d 211 (Fla. 1954), the state offered evidence that defendants had paid the $50 occupational tax, that they had registered, and, at 213, that they had "paid ten percent of their gross gambling income to the Federal Government." The exact form this proof took was not stated by the court, but it is apparent, from the careful distinction drawn by the court between the occupational tax and the excise tax with regard to self-incrimination, *id.* at 215, that the proof was of payment of the excise tax. One of the issues in *United States v. Whiting,* 311 F.2d 191 (4th Cir. 1962), was whether a sufficient showing of probable cause had been made to justify the issuance of a search warrant. The warrant was held to have been properly issued on the basis of an affidavit from agents of the Intelligence Division of the Internal Revenue Service. A part of the information these agents had, and set forth in the affidavit, was that "in November 1951 Whiting had paid a 10% excise tax

on wagers accepted by him in that month, in conformity with 26 U.S.C. § 4401 * * *." *Id.* at 193.

Perhaps Commissioner Caplin misread the statute he cited, but he accurately described the practice. Information as to payment of the excise tax which is made available to state prosecutors, as in *Mills* and *Boynton,* and to agents of the Intelligence Division, as in *Whiting,* is not confidential and is used for incriminating purposes.

6. A final argument in defense of the wagering excise tax, and the accompanying requirement that taxpayers incriminate themselves, is that the tax is valid as a tax, that the requirement of a return serves the valid governmental interest of making possible the collection of the tax, and that this governmental interest outweighs any incidental incriminating effect.

We do not question the validity of the excise tax as a tax, even if the notion that Congress passed this measure in a bona fide attempt to raise revenue, and without thought to its usefulness as an incriminating device, does require us to shut our minds to what "all others can see and understand * * *." *Bailey v. Drexel Furniture Co.,* 259 U.S. 20, 37 (1922). But the Fifth Amendment does not say that no person "shall be compelled in any criminal case to be a witness against himself unless the government has a valid interest in obtaining the information sought." Nor has the amendment ever been given such a debilitating construction. The law has been that proper invocation of the Fifth Amendment "afford[s] a witness the right to resist inquiry in all circumstances." *Barenblatt v. United States,* 360 U.S. 109, 126 (1959). The interest of privacy recognized by the amendment may not

be set aside even if the government is seeking his testimony in the name of "self-preservation, 'the ultimate value of any society.' " Id. at 128. So long as the state may not compel persons to convict themselves out of their own mouths in order to put an end to serious crimes, or even to preserve government itself, it should not be able to do so to collect a tiny amount in taxes or to facilitate prosecution of gamblers.

To hold that a person may not be required to incriminate himself by payment of the excise tax would not have a destructive effect on the fisc. When Congress is seriously interested in obtaining incriminating information in order to serve some other national purpose, it knows how to give immunity to those who produce the information, *e.g.*, 18 U.S.C. §§ 1406, 2424(b), 3486, and its power to provide such immunity has been repeatedly upheld. *Brown v. Walker,* 161 U.S. 591 (1896); *Ullmann v. United States,* 350 U.S. 422 (1956). Congress chose not to give such immunity to persons paying wagering taxes, and indeed expressly denied any immunity. 26 U.S.C. § 4422. If the result, then, is that the constitutional privilege makes the tax unenforceable, the fault lies not with the Constitution but with the Congress.

* * * *

At the outset of this section the incriminating features of the excise tax on wagers, and of Form 730, were pointed out. The various arguments which have been advanced in support of the tax, against objections based on the Fifth Amendment, were then examined. We submit that these arguments are unsound, both on precedent and on principle, and that to compel payment of the excise tax on wagers requires the taxpayer to incriminate himself, contrary to his constitutional privilege.

II. The Fifth Amendment Objections to the Excise Tax Require Reversal of the Conviction.

In this section of the brief we assume that which was argued in the preceding section, i.e., that payment of the excise tax on wagers would require the taxpayer to incriminate himself. Such a conclusion would seem to require reversal of the conviction and dismissal of the indictment with regard to counts 1 to 4 and 6 to 17, the counts dealing with the excise tax on which petitioner was convicted.* These counts were attacked on constitutional grounds by motion to dismiss the indictment, and the constitutional objection was preserved at all appropriate times during and after trial.

It is necessary to argue this point, however, because in *Costello v. United States,* No. 41, O. T. 1966, which is to be heard immediately before this case, the United States advances the position that if the occupational tax on wagering involves a substantial risk of self-incrimination, the proper remedy is for this Court to bar use of information acquired in connection with collection of the occupational tax, and to affirm the conviction of petitioner in that case. Since the United States may take a similar position with regard to the excise tax here involved, we consider the question.

Immunity statutes are, of course, a commonplace. There are more than 40 immunity acts in the United States Code, dealing with a large part of the regulatory activities of the federal government. Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,* 72 Yale L. J.

---

*Petitioner was found not guilty on count 5.

1568, 1570 (1963). Similar state statutes have been widely adopted. 8 Wigmore, Evidence § 2281 n. 11 (McNaughton rev. 1961). Such grants of immunity are valid if they are "so broad as to have the same extent in scope and effect" as the constitutional privilege. *Counselman v. Hitchcock,* 142 U.S. 547, 585 (1892). Congress has power to grant immunity as to use of compelled incriminating testimony by the states, *Adams v. Maryland,* 347 U.S. 179, 183 (1954), and may even bar state prosecution. *Ullmann v. United States,* 350 U.S. 422, 435-436 (1956). Similarly this Court has ruled, either as a constitutional matter or in the exercise of its supervisory control over federal prosecutions, that the federal government cannot make any use of testimony compelled under a state immunity statute, or of the fruits of such testimony. *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 79 (1964).

The striking fact about all of the cases to date has been that it is the legislative branch of government which has determined to provide immunity. If the judicial branch has the power to create immunity without legislative action, then the wrong result was reached in a long line of famous cases, from *Counselman v. Hitchcock,* 142 U.S. 547 (1892), to *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965). Indeed if judicial power extends so far, the two cases just cited would have been especially appropriate cases in which to exercise it, for in each of those cases Congress had attempted to provide immunity, but had failed to make the immunity sufficiently broad to be coextensive with the privilege. It would have been far less heroic a step for this Court to broaden to the extent constitutionally re-

quired an immunity Congress had sought to confer than it would be to create out of whole cloth an immunity which Congress has expressly disclaimed. 26 U.S.C. § 4422. "Movant contends that neither Section 3290 [now § 4411] nor Section 3291 [now § 4412] contain any immunity to bar incriminating evidence furnished by a compliance therewith. That such omission was intended by Congress is made manifest by the provisions of Section 3297 [now § 4422] quoted above." *United States v. Forrester*, 105 F. Supp. 136, 137 (N.D. Ga. 1952). See also *Irvine v. California*, 347 U.S. 128, 130 (1954).

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964), is not contrary to the conclusion here suggested. In *Murphy* the state had invoked a state immunity statute. This Court was required to decide there what effect that statute had on use of the testimony in a federal prosecution, in the light of the holding in that case discarding the "separate sovereignty" conception of the privilege. Here no legislature, federal or state, has granted any immunity.

The decision to grant immunity is not an easy or automatic one. Immunity statutes "can be justified only if the assistance that they provide government organs in obtaining information necessary to the performance of their functions outweighs the possible harm they do to the government—through unintended grants of immunity—and to individuals by subjecting them to social stigma, and perhaps, to painful, 'remedial,' sanctions." Comment, 72 Yale L. J. 1568, 1598 (1963). This kind of delicate balance is one appropriately struck by that branch of government in which the power to make laws is vested.

Argument.

Even if the Court were to think it proper to create a rule of immunity, forbidding use in federal and state prosecutions of excise tax returns and payments, or the fruits thereof, petitioner's conviction on the counts in question should be reversed. Petitioner did not pay the excise tax and, on the assumption on which this section of the brief is based, was correct in supposing that to pay the tax would force him to incriminate himself contrary to the Constitution. Here, unlike the situation in the companion *Costello* case, there were no decisions of this Court holding that he had no constitutional privilege to refuse to pay. He could have had no reason to anticipate that this Court would later hold that exicse tax returns could not be used against him in other prosecutions. Indeed the language of 26 U.S.C. § 4422 would have suggested precisely the opposite result. In *Raley v. Ohio,* 360 U.S. 423, 426 (1959), it was held that to convict a citizen for exercising a privilege which the state had clearly told him was available to him "would be to sanction an indefensible sort of entrapment by the State." It would be no more defensible to convict a citizen for exercising a privilege which was, by hypothesis, available to him save for a later creation of a an immunity which he could not possibly have anticipated. In *Bouie v. City of Columbia,* 378 U.S. 347, 352 (1964), it was held that "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language" was a denial of due process of law. To hold that the constitutional privilege can be supplanted by an unforeseeable and retroactive judicial creation of an immunity in the face of narrow and precise statutory language denying immunity would raise similar questions of due process. If the Fifth Amendment objections to the ex-

cise tax are sound, as argued in the first section of this brief, the proper remedy is reversal of petitioner's conviction on those counts involving the excise tax.

III. The Conviction Should Be Reversed Because the Communications Between the Court and Jury in the Absence of Petitioner and His Counsel Have Not Been Shown Not to Be Prejudicial.

It is settled law that no communication may take place between the court and the jury in the absence of the defendant. This principle is now stated in Rule 43 of the Federal Rules of Criminal Procedure, but its origins are in the Sixth Amendment and it has long been recognized by this Court. In *Lewis v. United States,* 146 U.S. 370, 372 (1892), the Court declared: "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." At the same term, in *Mattox v. United States,* 146 U.S. 140, 150 (1892), the Court had said: "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden and invalidate the verdict, at least unless their harmlessness is made to appear." In the present case while the jury was deliberating the trial court received a communication from the jury, the exact contents of which are unknown, in the absence of both petitioner and his counsel. The bailiff, on instructions from the court, then gave the jury a message from the court, the contents of which are entirely unknown, in the absence of both petitioner and his counsel. This violation of petitioner's right to be present at every stage of the trial was plainly im-

proper under the principles announced in the *Lewis* and *Mattox* cases. The court below twice declared that this course of events in the trial court was "obvious error." 358 F.2d at 157, 158. Nevertheless it affirmed the conviction. In this, we submit, it erred.

The case in this Court closest in point is *Shields v. United States,* 273 U.S. 583 (1927). There counsel for the government and for the defendants had joined in a request to the court that the jury be held in deliberation until they should agree upon a verdict. Later in the deliberations the jury sent a note to the judge advising him of their verdict with regard to some defendants and of their inability to agree as to other defendants. The judge sent back a note telling the jury they would also have to find whether these other defendants were guilty or not guilty. These notes were received and sent in the absence of Shields and of his counsel, and they were not advised as to the notes, though the notes were preserved and made a matter of record. After the Third Circuit had affirmed Shields' conviction, Solicitor General William D. Mitchell advised this Court that "the government is unable to find any satisfactory ground for opposing the petition for a writ of certiorari," *id.* at 587, and a unanimous Court, speaking through Chief Justice Taft, reversed. Although the petitioner had assigned various grounds for reversal, among which were claims that the note sent to the jury was erroneous in substance, the Court found it unnecessary to consider such claims. It was enough for reversal, in the Court's view, that the trial court had communicated with the jurors in the absence of the defendant. The Court referred to *Fillippon v. Albion Vein Slate Co.,* 250 U.S. 76 (1919), in

which it had been held reversible error to send a supplemental written instruction to the jury in a civil case without notice to counsel and an opportunity to object, and said, at 588-589: "If this be true in a civil case, a fortiori is it true in a criminal case? The request made jointly by the counsel for the defendant and for the government to the court did not justify exception to the rule of orderly conduct of jury trial entitling the defendant, especially in a criminal case, to be present from the time the jury is impaneled until its discharge after rendering the verdict."

Reversal in this case would seem required by *Shields,* since in that case the contents of the communications were known, while here they are unknown. In only one respect is the *Shields* case distinguishable from this. In *Shields* defendant and his counsel did not learn of the communications until long after the verdict, while in the present case counsel for the defendant was advised by the government attorney of the fact of the communication some 45 minutes after it was made. The court below, apparently deeming this a significant distinction, rested its holding in part on the failure of counsel to object when he was informed of the communications. Neither the applicable rule, nor the cases, require an objection in the circumstances of this case. Criminal Rule 51, which ordinarily requires a party to make known his objection to the action of the court and the grounds therefor, contains the proviso: "but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him." By the time petitioner and his counsel learned of the communications between court and jury, whatever damage was

caused by them had been fully done. Of course objection is required in such a case as *United States v. Woodner*, 317 F.2d 649, 651 (2d Cir. 1963). There the judge held conferences with prospective jurors in the sight of defendant and his counsel but out of their hearing. Counsel knew what was occurring and could immediately have objected. Counsel in the present case, who did not know what was happening until after it was over, did not need to make an objection which would have served no useful purpose. As this Court said in the *Fillippon* case, the decision considered controlling in *Shields*: "It is not correct, however, to regard the opportunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings." Similarly in *Brasfield v. United States*, 272 U.S. 448 (1926), a conviction was reversed because the judge inquired as to the numerical division of the jury, though no exception was taken to this action by the court. It was said in that case, at 450, that the power of the appellate court to correct an error though no exception was taken applies especially "where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done." See also *United States v. Neal*, 320 F.2d 533 (3d Cir. 1963). There a conviction was reversed because the court responded to a note from the jury in the absence of defendant and counsel. Counsel were advised of this before the jury returned and made no objection. The case seems indistinguishable from the present case.

Although the decision below appears to rest in part on the absence of objection, the principal reason given by the Third Circuit for affirming in the face of what it

recognized to be "obvious error" is that such errors "do not warrant reversal in the absence of prejudice to the substantial rights of the appellant." 358 F.2d at 158. The court could find no prejudice since "the evidence as to the appellant's guilt was overwhelming and * * * therefore there was no reasonable likelihood that the judge's instruction to the jury influenced the verdict." *Ibid.*

It is not the law, however, that a defendant denied his right to be present at every stage of the proceeding against him must show that he has been prejudiced by this course of conduct. Some cases require no showing of prejudice whatever. This seems implicitly to be the teaching of *Shields,* because there the contents of the notes were known, the instruction conveyed by the note from the judge was assigned as error, but this Court expressly refused to pass on that ground, and, without any discussion of possible prejudice, reversed on the bare ground that the notes had been exchanged in the absence of the defendant. This is explicitly the teaching of *Arrington v. Robertson,* 114 F.2d 821, 823 (3d Cir. 1940), a civil case in which Judge Maris, writing for the Third Circuit, said that for the judge to send written instructions to the jury in the absence of defendant or his counsel "was the denial of a right so fundamental as necessarily to affect the substantial rights of the defendant regardless of the nature or propriety of the instruction given." In *Evans v. United States,* 284 F.2d 393 (6th Cir. 1960), supplemental instructions were given to the jury in open court with counsel present but the defendant inadvertently absent. The jury was immediately recalled to the courtroom and the supplemental instruc-

tions read by the reporter in the presence of the defendant. When this was concluded counsel for defendant three times said he was satisfied by this handling of the matter. Nevertheless it was held that reversal was required.

Though there is, as indicated, case support for the view that communications to the jury in the absence of the defendant require reversal regardless of the possibility of prejudice, we do not press for such a rule. We do not need to do so for reversal in this case, and we consider that such a rule would be unduly drastic. When all the circumstances as to the communications are known, and when it can be said "with certainty that no harm has been done," *Ferrari v. United States,* 244 F.2d 132, 145 (9th Cir. 1957), it would be insisting on form to reverse.

The rule which we think appropriate, and best supported in the cases, is that there must be reversal unless it affirmatively appears in the record that there was no reasonable possibility of prejudice to the defendant. This was the perception of this Court when it was first called upon to deal with such a problem. It said that private communications "invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States,* 146 U.S. 140, 150 (1892). This is the construction which the Court has given the "harmless error" statute, 28 U.S.C. § 2111, in a variety of other contexts. It has held that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. *McCandless v. United States,* 298 U.S. 342 (1936); *Bihn v. United States,* 328

U.S. 633, 638 (1946). This is the rule which has been adopted in terms in at least six circuits to deal with the specific problem of communications between court and jury outside the presence of the defendant. *Walker v. United States,* 322 F.2d 434, 436 (D.C.Cir. 1963); *United States v. Compagna,* 146 F.2d 524, 528 (2d Cir. 1944); *Estes v. United States,* 335 F.2d 609, 618 (5th Cir. 1964); *Rice v. United States,* 356 F.2d 709 (8th Cir. 1966); *Wheaton v. United States,* 133 F.2d 522, 527 (8th Cir. 1943); *Ray v. United States,* 114 F.2d 508, 513 (8th Cir. 1940); *Ah Fook Chang v. United States,* 91 F.2d 805, 810 (9th Cir. 1937); *Jones v. United States,* 299 F.2d 661, 662 (10th Cir. 1962); *Little v. United States,* 73 F.2d 861, 865-867 (10th Cir. 1934); *Fina v. United States,* 46 F.2d 643, 644 (10th Cir. 1931).

It may be that the Second Circuit has departed from this rule, which it followed in the *Compagna* case cited in the list above, for in *United States v. Woodner,* 317 F.2d 649, 652 (2d Cir. 1963), that court, while citing *Compagna,* appears to say that the defendant must make "some plain showing" of prejudice from the communications. If that is the holding of *Woodner,* it stands alone, save for the decision below in the present case. Such a rule would provide no protection to a defendant. To put the burden on defendant "to show something as prejudicial on which the record is silent, and defendant had no opportunity to hear, would be requiring of defendant the impossible. Such is not the law." *Fina v. United States,* 46 F.2d 643, 644 (10th Cir. 1931).

The court below found no reasonable likelihood that petitioner was harmed because it deemed the evidence of his guilt to be "overwhelming." Surely this is not the

kind of showing which the cases demand, for "it is not the appellate court's function to determine guilt or innocence." *Kotteakos v. United States,* 328 U.S. 750, 763 (1946). The evidence seemed less than overwhelming to the jury, which twice reported its inability to agree on a verdict. In a case in which the jury is divided it is especially important that no impropriety be tolerated which might have influenced the course of proceedings. On this record no one can say whether petitioner was prejudiced by the communications because no one knows what they were.

It was the recollection of the trial judge that the note which the jurors sent him stated that the jury could not agree, and that it was "to the same effect" and "at least in substance the same" (R. 70) as a later note from the jury which is a matter of record (R. 60). But this is not enough to show what was in the first note. Instead it shows only what the judge, five days later, said was in the note. It is not beyond the bounds of reasonable possibility that the first note may have indicated the numerical division of the jury. See, *e.g., Williams v. United States,* 338 F.2d 530 (D.C.Cir. 1964); *Mullin v. United States,* 356 F.2d 368 (D.C.Cir. 1966). If it did so, it is possible that the court should have immediately declared a mistrial, and in any event the court's action subsequently in keeping the jury together when a juror became ill, and was unable to participate in deliberations for a day and a half, would take on quite a different color.

The statements by the court with regard to the note at the hearing on the motion for a new trial suggest that the note was innocuous, and contained no information of the sort just described. But it implies no disrespect for

federal judges in general, or for the judge who presided at the trial of this case in particular, to note that human memory is a fallible thing. Elaborate rules in the law of evidence have been built on the proposition that "as respects oral testimony purporting to give from memory the terms of a writing, there is a special risk of error, greater than in the case of attempts at describing other situations generally." McCormick, Evidence 410 (1954). If a witness in a suit—even though he be a federal judge—were called to testify about an important writing, he would not be permitted to describe its contents without first accounting for the nonproduction of the original, and he then would be subject to searching cross-examination to test the accuracy of his recollection.

This illustrates the importance of the rule against communications between court and jury save in the presence of the defendant. When the rule is departed from, as here, either the subsequent statement of the judge as to what transpired must be accepted without question, which would be unrealistic, or the judge must be subjected to cross-examination and impeachment, which would be undesirable. Rigorous insistence on the rule against private communications protects the role of the judge as an impartial mediator whose word need never be questioned, and best maintains the confidence of the bar and the public in the federal judiciary.

We are able to see only as through a glass darkly what the jury said to the judge in its note. We lack even that knowledge of what the bailiff told the jury in response to the note. The only information in the record on this point is the affidavit of counsel for petitioner in which he recites that the United States Attorney informed him that the court had instructed the jury,

through the bailiff, to keep deliberating (R. 84). This is third-hand information as to what the judge said, and conveys nothing as to what the bailiff said. In *Ah Fook Chang v. United States,* 91 F.2d 805 (9th Cir. 1937), the foreman of the jury was given an oral answer, in the presence of counsel, to a question put by the jurors. This was held reversible error. "Further, we have the case where no one knows what the juror told the rest of the jury. If he repeated correctly the judge's instruction, the error would not be prejudicial. If he did not, the error may have been prejudicial. We must presume it prejudicial. * * * The jury received an instruction second hand, and not by the judge. Chances for error are too great." *Id.* at 810. The chances for error dictated reversal also in *Little v. United States,* 73 F.2d 861 (10th Cir. 1934). There the jury requested that instructions be reread, and the court, in the presence of counsel, sent the court reporter to the jury room to read them. "No harm may come from it, it is true; but on the other hand, a mistake in the reading of a shorthand symbol which defense counsel would instantly detect, an unconscious or deliberate emphasis or lack of it, an innocent attempt to explain the meaning of a word or a phrase, and many other events which might readily occur, would result in irremediable prejudice to the defendant." *Id.* at 864.

The instruction to keep deliberating is not a mere administrative detail, equivalent to telling the jury they may take a break for a meal. As a flood of recent cases in the courts of appeals indicate, one of the burning issues in criminal procedure today is what may properly be said to a deadlocked jury. For all the record shows, or any party to this litigation knows, the bailiff may have

given the jury his own version of the *Allen* charge. He may have told the jury, "You have got to reach a decision in this case." Cf. *Jenkins v. United States,* 380 U.S. 445 (1965). These are not imaginary horribles. See *Wheaton v. United States,* 133 F.2d 522 (8th Cir. 1943), where, in response to a note from the jury saying it was hopelessly deadlocked, the judge sent the bailiff back with the message he would not excuse them. The bailiff then stayed on in the jury room for some time explaining how they could vote separately on different counts.

Here, as in *Little v. United States,* 73 F.2d 861, 865 (10th Cir. 1934), "the record is silent as to what occurred in the jury room. There is nothing therefore in this record to support a finding, affirmatively made in the cited cases, that the error was necessarily harmless." The conviction should not stand in these circumstances.

CONCLUSION

The judgment below should be reversed, with instructions to dismiss the indictment as to counts 1 to 4 and 6 to 17, and with instructions for a new trial on counts 20 to 23.

Respectfully submitted,

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219
Attorney for Petitioner

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Of Counsel

November, 1966

APPENDIX

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V. No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

United States Constitution, Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Code, title 26, section 4401:

(a) Wagers. There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

United States Code, title 26, section 4422: The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

United States Code, title 26, section 6107: In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officers of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1

for each 100 words or fraction thereof in the copy or copies so requested may be charged.

Treasury Regulations § 44.6011(a)-1(a): Every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by §§ 44.4403-1 and 44.6001.1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. A return shall be made for each month whether or not liability has been incurred for that month. If the taxpayer ceases operations which make him liable for the tax, the last return shall be marked "Final Return."

Federal Rules of Criminal Procedure, Rule 43: The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. * * *

Federal Rules of Criminal Procedure, Rule 51: Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

FORM 730 (Rev. Sept. 1960)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) ..... (Date) .....

(Title) .....
(Owner, president, partner, member, etc.)

(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$.....
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$.....
3. Sum of items 1 and 2	$.....
4. Tax (10 percent of item 3)	$.....
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4 (*a*) and (*b*))	$.....
6. Net tax due (item 4 less item 5)	$.....

MONTH		
	Penalty	$.....
	Interest	$.....
	Total due	$.....

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. **IMPORTANT.**—Follow instructions carefully.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	3
Argument	6
Introduction	6
I. The minimal disclosure incident to payment of the excise tax on wagers does not infringe upon the Fifth Amendment privilege against self-incrimination	7
A. Congress may tax what it or a State makes unlawful; that power necessarily includes the power to require payment	7
B. The privilege claim in regard to payment of the ten percent excise tax on wagers is governed by the decisions in *Kahriger* and *Lewis*	16
II. Even assuming that payment of the excise tax on wagers might provide incriminating information, the proper remedy is to bar the use of such information in any criminal prosecution, rather than sanction a failure to pay the tax	18
A. Adoption of a use-restriction rule, as suggested in our alternative argument in the *Costello* case, would appropriately effectuate the privilege	20
B. The use-restriction rule suggested differs from a rule of immunity	22
C. The alternative remedy proposed does not conflict with the congressional design of the wagering tax laws	26
D. On either approach taken to the Fifth Amendment issue, petitioner was properly convicted for failure to pay the excise tax	28

242-003—66——1

Argument—Continued
III. Reversible error cannot be predicated on the trial judge's treatment of a note from the jury ..... Page 30
Conclusion 35
Appendix A 37
Appendix B 41

Cases:

Adams v. *Maryland*, 347 U.S. 179 21
Albertson v. *Subversive Activities Control Board*, 382 U.S. 70 ..... 25, 26
Bacino v. *United States*, 316 F. 2d 11, certiorari denied, 375 U.S. 831 34
Billings v. *United States*, 232 U.S. 261 10
Patricia Blau v. *United States*, 340 U.S. 159 13
Brushaber v. *Union Pacific R.R. Co.*, 240 U.S. 1 10
Costello v. *United States*, No. 41, this Term ..... Passim
Counselman v. *Hitchcock*, 142 U.S. 547 25
Feldman v. *United States*, 322 U.S. 487 28
Hoffman v. *United States*, 341 U.S. 479 13
Jack v. *Kansas*, 199 U.S. 372 21
James v. *United States*, 366 U.S. 213 12
Johnson v. *United States*, 270 F. 2d 721, certiorari denied, 362 U.S. 937 33
Knapp v. *Schweitzer*, 357 U.S. 371 ..... 27, 28
Lewis v. *United States*, 348 U.S. 419 ..... 16, 17, 18, 29
License Tax Cases, 5 Wall. 462 ..... 9, 12
Malloy v. *Hogan*, 378 U.S. 1 27
McCray v. *United States*, 195 U.S. 27 10
Miranda v. *Arizona*, 384 U.S. 436 22
Murphy v. *Waterfront Commission*, 378 U.S. 52 ..... 4, 5, 20, 21, 22, 23, 26, 28
Nigro v. *United States*, 276 U.S. 332 9
Outlaw v. *United States*, 81 F. 2d 805, certiorari denied, 298 U.S. 665 34
Parker v. *Gladden*, No. 81, this Term, decided December 12, 1966 34
Remmer v. *United States*, 347 U.S. 227 34
Rutkin v. *United States*, 343 U.S. 130 12
Shields v. *United States*, 273 U.S. 583 34
Simpson v. *United States*, 355 U.S. 7 15
Sonzinsky v. *United States*, 300 U.S. 506 9
Twining v. *New Jersey*, 211 U.S. 78 27

Cases—Continued

	Page
Ullmann v. *United States*, 350 U.S. 422	21
United States v. *Blue*, 384 U.S. 251	20, 21
United States v. *Coduto*, 284 F. 2d 464, certiorari denied, 365 U.S. 881	33
United States v. *Compagna*, 146 F. 2d 524, certiorari denied, 324 U.S. 867	34
United States v. *Constantine*, 296 U.S. 287	10
United States v. *Doremus*, 249 U.S. 86	9
United States v. *Gersh*, 328 F. 2d 460, certiorari denied, *sub nom. Mugnola* v. *United States*, 377 U.S. 992	33
United States v. *Kahriger*, 345 U.S. 22	16, 17, 18, 29
United States v. *McGrady*, 191 F. 2d 829, certiorari denied, 342 U.S. 911	33
United States v. *Murdock*, 284 U.S. 141	21
United States v. *One Ford Coupe*, 272 U.S. 321	9
United States v. *Sanchez*, 340 U.S. 42	9
United States ex rel. Shapiro v. *Jackson*, 263 F. 2d 282	34
United States v. *Sorcey*, 151 F. 2d 899, certiorari denied, 327 U.S. 794	33
United States v. *Stafoff*, 260 U.S. 477	9
United States v. *Sullivan*, 274 U.S. 259	11
United States v. *Woodner*, 317 F. 2d 649, certiorari denied, 375 U.S. 903	33
Walker v. *United States*, 322 F. 2d 434, certiorari denied, 375 U.S. 976	33
Weeks v. *United States*, 232 U.S. 383	22
Constitution, statutes and regulations:	
U.S. Constitution, Art. I, Sec. 8	7
5 U.S.C. 22	14
5 U.S.C. 1002(c)	14
18 U.S.C. 371	2
18 U.S.C. 3486	13, 20
Internal Revenue Code of 1954:	
26 U.S.C. 4041, 4061, 4081, 4091, 4401, 4402, 4411, 4412, 4421, 4422, 4461, 4701, 4711, 4721, 4741, 4751, 4811, 4821, 4841, 5001, 5021, 5091, 5101, 5111, 5121, 5701, 5801, 5811, 5821, 6103, 6107, 7203	2, 6, 14, 26, 27, 37, 38, 39, 40
49 U.S.C. 9	14

Constitution, statutes and regulations—Continued Page
Treas. Reg. § 44.6011(a)–1(a) 7, 40
Treas. Reg. 601.702(a)(3) 14
Treas. Reg. 601.702(d) 14
Miscellaneous:
Commissioner of Int. Rev. Ann. Rep., Table 3, pp. 114–115; Table 1, p. 106 6
97 Cong. Rec. 6891 27
97 Cong. Rec. 12238 27
H.R. Rep. No. 586, 82d Cong., 1st Sess. 55 ..... 12, 27, 28
Note, 61 Northwestern L. Rev. 654 22
Note, 72 Yale L.J. 1568 20
S. Rep. No. 781, 82d Cong., 1st Sess. 113 ..... 12, 27, 28

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 181

ANTHONY M. GROSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 113–128) is reported at 358 F. 2d 154. The district court opinion on the motion to dismiss the indictment (R. 26–28) is reported at 225 F. Supp. 161, 174–175.

JURISDICTION

The judgment of the court of appeals (R. 129) was entered on March 25, 1966. A petition for rehearing (R. 130) was denied on May 3, 1966. The petition for a writ of certiorari was filed on May 28, 1966, and was granted on October 10, 1966 (R. 131). The jurisdiction of the Court rests on 28 U.S. 1254 (1).

QUESTIONS PRESENTED

1. Whether payment of the ten percent federal excise tax on wagers may be avoided on the ground that payment would violate the privilege against self-incrimination.

2. Whether the trial judge erred in his treatment of a note from the jury.

STATUTES INVOLVED

The pertinent provisions of the wagering tax laws and Treasury regulations are printed in Appendix A, *infra*, pp. 37–40.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Western District of Pennsylvania on fifteen counts charging the wilful failure to pay the excise tax on wagers imposed by 26 U.S.C. 4401; on four counts charging the wilful failure to pay the special occupational tax, as required by 26 U.S.C. 4411, prior to engaging in the business of accepting wagers; and on one count charging a conspiracy, in relation to the excise tax, to defraud the United States in violation of 18 U.S.C. 371. On March 10, 1963, he was sentenced to imprisonment for a total of nine years and was fined $191,000 (R. 8–10). The court of appeals affirmed (R. 129).

Prior to trial, petitioner unsuccessfully moved to dismiss those counts (counts 1 through 19) which charged failure to pay the ten percent excise tax on wagers on the ground that payment would violate his privilege against self-incrimination (R. 26–28; 225 F. Supp. at 175). A similar objection was made and

rejected during trial (R. 35), as part of a motion for a judgment of acquittal at the close of the government's case (R. 36–37), in a motion for judgment after verdict, and in a motion for a new trial (R. 75–77; 78–84).

The evidence in this lengthy case, the sufficiency of which is not here in issue, showed that petitioner conducted with others a large-scale gambling operation. Petitioner, however, testified that he had gone out of the "numbers business" in 1950 when the gambling stamps "came into play" and had turned over the business to his brother, co-defendant Samuel Grosso (R. 104–105). He said he reported for income tax purposes "around $50,000 a year" derived largely from personal gambling in Florida and elsewhere (R. 108–113).[1]

SUMMARY OF ARGUMENT

I

Payment of the ten percent excise tax on wagers does not violate the privilege against self-incrimination. As has been repeatedly held, the federal government may tax activity which either it or a State may make unlawful. The information revealed in effecting payment of the excise tax and filing the related return is minimal—identification of the taxpayer and the tax computation. Payment is, obviously, a

[1] Since the facts relating to the second issue raised by petitioner—that of an improper communication to the jury—are wholly distinct from those underlying his wagering tax contentions, they are set forth, together with our argument on that issue, in Point III, *infra*, pp. 30–32.

necessary component of a tax; if Congress cannot compel payment and punish non-payment, it can hardly be said to have the power to levy the tax. Hence, in our view, the limited nature of the inquiry and the governmental interest in tax collection dictate the conclusion that payment of a valid tax may be required without running afoul of the privilege. Moreover, the statute plainly provided notice to petitioner of the tax consequences attached to entering and engaging in the business of accepting wagers. Having voluntarily chosen to enter that business, he must respect the tax conditions previously attached to it; thus, no prohibited compulsion inheres in payment of the tax.

II

Should the Court nonetheless conclude that payment of the excise tax on wagers involves substantial danger of incrimination, the Fifth Amendment rights asserted can be fully protected by adoption of a rule restricting the use of the information disclosed. Such a rule is particularly appropriate where the privilege is invoked to excuse not merely non-registration but a failure to pay the excise tax at all. A use-restriction rule would be a viable accommodation between the individual's right not to incriminate himself and the governmental interest in collecting taxes. A similar resolution of a conflict between Fifth Amendment rights and governmental interests was effected by this Court in *Murphy* v. *Waterfront Commission*, 378 U.S. 52. There would be nothing unique or unusual about the adoption of such an exclusionary rule;

rather, it would be a step which this Court has repeatedly taken in appropriate circumstances, such as in *Murphy*.

Whether to grant complete immunity from prosecution incident to obtaining certain information is a matter traditionally committed to legislative judgment. What is suggested here is not a rule of immunity, but an exclusionary rule—one which would proscribe the use, directly or indirectly, of information disclosed incident to registration and payment under the wagering tax laws, in any subsequent federal or State prosecution. In situations where Congress has not acted, it is within this Court's power to fashion such a rule; to do so here would in no way conflict with the congressional design in enacting the wagering tax laws.

III

During their deliberations, the jury sent the trial judge a note in which they indicated they could not agree. The judge informally responded through the bailiff that the jury should keep on working. Although notified of the incident within forty-five minutes of its occurrence, petitioner waited until after the verdict was reached, notwithstanding a second similar note and like response, to raise the issue of an improper communication to the jury in his absence. Had the issue been seasonably raised, any speculation as to possible prejudice could have been investigated and resolved in the trial court. Since petitioner did not pursue this course, reversal in the circumstances is unwarranted.

ARGUMENT

INTRODUCTION

In the goverment's brief in *Costello* v. *United States,* No. 41, this Term, pp. 9–11, we have set forth a summary and history of the wagering tax laws. We do not repeat that summary and history here. We note, however, that there are a number of other federal excise taxes and that these taxes relate to such disparate products, goods, or activities, as, *e.g.,* petroleum products (26 U.S.C. §§ 4041, 4081, 4091), motor vehicles, parts, and accessories (§ 4061), stills and condensers (§ 5101), coin-operated gaming devices (§ 4461), liquor, wine and beer (*e.g.,* §§ 5001, 5021, 5091, 5111, 5121), filled cheese (§ 4841), adulterated butter (§§ 4811, 4821), narcotic drugs and marihuana (§§ 4701, 4711, 4721, 4741, 4751), tobacco (§ 5701), and certain firearms (§§ 5801, 5811, 5821).[2] This list is far from exhaustive of the subjects of present excise taxes; nor would a complete list be exhaustive of the congressional power "to lay and

[2] The incidences of the taxes differ. Some of the taxes are imposed on the manufacturer, wholesaler, or retailer, or a combination thereof; those taxes may be of the occupational variety, requiring the payment of a fixed sum per year and evidenced by a stamp, or they may be levied as a percentage of the value of the product made or sold, or both. Some are imposed on the product itself, and others are imposed upon a transaction, such as the transfer or importation of particular products or goods. For a complete listing of the subjects of the excise taxes in force during 1965 and the revenue (over 14.5 billion dollars) derived from these taxes, see Commissioner of Int. Rev. Ann. Rep., Table 3, pp. 114–115 (1965); *id.*, Table 1, p. 106.

collect * * * excises * * * uniform throughout the United States." Constition, Art. I, Sec. 8. As is evident, the excise taxes listed above involve or relate both to lawful activity and to activity, products, or goods which are illegal under various federal, State and municipal laws.

I. THE MINIMAL DISCLOSURE INCIDENT TO PAYMENT OF THE EXCISE TAX ON WAGERS DOES NOT INFRINGE UPON THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

A. CONGRESS MAY TAX WHAT IT OR A STATE MAKES UNLAWFUL; THAT POWER NECESSARILY INCLUDES THE POWER TO REQUIRE PAYMENT

We emphasize at the outset the reach of petitioner's constitutional contention—that the *payment* of the ten percent excise tax on wagers would infringe upon his privilege against self-incrimination, and that his admitted failure to pay the tax is therefore excused by the Fifth Amendment.[3] The Constitution, we submit, provides no such easy escape from the duty to pay a tax. Petitioner's contention is not limited to objections to the excise tax return and to the information sought thereon;[4] payment alone, he urges, would vio-

[3] In the companion *Costello* case, it should be noted, the validity of the special occupational tax and its related registration provision are at issue. Although petitioner here was convicted on four counts for non-payment of the occupational tax, he has consistently restricted his constitutional contention to those counts involving the excise tax (Pet. Br. 3, 39).

[4] The return (Form 730) is attached as Appendix B, *infra*, p. 41. By regulation (Treas. Reg. § 44.6011(a)–1(a), App. A. *infra*, p. 40), the return is to be filed monthly. It includes spaces for the listing of the gross amount of wagers accepted during the month, the amount of "lay-off" wagers accepted (*i.e.*, a

late the privilege so long as it is necessary that the taxpayer identify himself (Pet. Br. 17). In short, petitioner contends that Congress must provide total immunity from any possible prosecution when it levies an excise tax if the activity taxed might be unlawful (Pet. Br. 24).

If Congress has the power to tax, the taxpayer must necessarily have the correlative duty to pay the tax. That power does not exist in the abstract; a tax obviously has reference to taxpayers—those subject to and required to pay the tax. Thus, unless Congress can compel payment and impose sanctions upon non-payment of a particular tax, it can hardly be said that Congress has the power to levy that tax. Necessarily encompassed by the power to tax is the right to obtain information essential to collection of the particular tax.[5] Certainly, a tax scheme could not be administered without the government's obtaining the name and address of those paying the tax. Little else is required by Form 730 beyond that identifying information and a computation of the tax due.

This Court has consistently sustained the legal obligation to pay taxes on activity which a State (or

---

wager from another person in the business of accepting wagers, placed to spread the risk of winning bets), and the amount of the tax due (ten percent of the total of the preceding amounts, less the amount of credits).

[5] In the companion *Costello* case, we contend that the registration and disclosure provisions of the wagering tax laws, relating to the occupational tax, are reasonable incidents to the tax measure since necessary for enforcement and collection. Petitioner here, however, challenges the authority of the government to obtain not only the minimal information essential to tax administration, but payment itself.

the United States) makes unlawful. *License Tax Cases*, 5 Wall. 462 (lotteries); *United States* v. *Doremus*, 249 U.S. 86 (narcotic drugs); *Nigro* v. *United States*, 276 U.S. 332 (same); *Sonzinsky* v. *United States*, 300 U.S. 506 (firearms); *United States* v. *Sanchez*, 340 U.S. 42 (marihuana). See also *United States* v. *One Ford Coupe*, 272 U.S. 321; *United States* v. *Stafoff*, 260 U.S. 477, 480. Implicit in these decisions over the last century is a flat rejection of petitioner's contention, for the power of Congress to levy and collect an excise tax on various activities, without regard to their legality or illegality, has repeatedly been upheld. That is not to say that a valid tax may be administered free of all constitutional restrictions. But we urge that payment of the ten percent excise tax and the related filing of Form 730 should not be regarded as having any constitutional infirmities.

The excise tax on wagers is imposed uniformly, and does not depend on whether the underlying activity taxed is lawful or not under State or local law—just as the excise tax on retail dealers in liquor does not depend on whether or not a State has adopted prohibition laws. In the *License Tax Cases*, 5 Wall 462, 473, the Court stated:

> It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

Petitioner's contention presents just such an anomaly, for he urges that he is privileged not to pay this tax, primarily because his State prohibits gambling.

But, as this Court said with regard to the excise tax on retail liquor dealers (*United States* v. *Constantine*, 296 U.S. 287, 293):

> It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law. The rule has always been otherwise.[6]

Yet, if petitioner were correct, in practical effect exemption from an otherwise valid tax results because a State has chosen to make unlawful a particular activity which Congress seeks to tax. However, as this Court said in another tax context (*Billings* v. *United States*, 232 U.S. 261, 282):

> It is * * * settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution * * *.

See also *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. 1; *McCray* v. *United States*, 195 U.S. 27, 61.[7]

---

[6] In *Constantine*, the Court stuck down an additional $1,000 tax imposed only on those retail dealers who operated in a locality where the sale of liquor was prohibited. The Court expressed no doubt as to the validity of the $25 tax uniformly applicable, regardless of whether local law proscribed retail liquor sales. See our brief in *Costello*, p. 12, n. 10.

[7] Petitioner also urges that he is privileged not to pay the ten percent excise tax because that might reveal his failure to

The "conjurer's circle" that petitioner attempts to draw around himself and his activities would be as destructive of the proper enforcement of the excise tax laws as the attempt made by the taxpayer in *United States* v. *Sullivan*, 274 U.S. 259, 264. There, the taxpayer unsuccessfully urged that he was privileged not to file an income tax return because his income was principally derived from illicit traffic in liquor.[8]

Petitioner suggests that Congress must immunize from prosecution those whose activity it taxes (Pet. Br. 24). But obviously a State is free to prohibit, restrict, or condition conduct such as gambling. Congress, we submit, was equally free to make the realistic assessment which underlies the wagering tax laws:

> Commercialized gambling holds the unique position of being a multi-billion-dollar, Nation-wide business that has remained comparatively free from taxation by either State or Fed-

---

register as one in the business of accepting wagers and his failure to pay the occupational tax. But it has never been the law that one is excused from complying with a legal obligation because compliance might disclose some earlier delict. On petitioner's theory, a taxpayer who failed to file a tax return in one year might claim a privilege against filing a return in following years on the ground that the filing in a subsequent year might reveal to the Internal Revenue Service the previous failure to file. See also our brief in *Costello*, p. 19, n. 19.

[8] We concede (see our brief in *Costello*, p. 22, n. 21) that *Sullivan* is distinguishable and does not govern here. The income tax is directed at the broadest class possible and the form used is neutral on its face. By definition, an excise tax is directed at more limited classes of persons, products or goods, and Form 730 is for use only in making a wagering tax return.

> eral Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation.

H.R. Rep. No. 586, 82d Cong., 1st Sess. 55 (1951); S. Rep. No. 781, 82d Cong., 1st Sess. 113 (1951). Indeed, in proposing the wagering tax, the committees noted (*ibid.*):

> Since its inception, the Federal income tax has applied without distinction to income from illegal as well as legal sources, and it has never been generally supposed that such application carried with it any implied authorization to carry on illegal activities. Moreover, in the field of excise taxes the tax on coin-operated gambling devices has been applied without regard to whether or not the operation of a particular machine is in violation of State or local law. The present bill conforms to this pattern and imposes tax without regard to the legality or illegality of the particular wager.

If by asserting that immunity is a necessary requisite, petitioner means that Congress would have to declare the acceptance of wagers legal in order to tax one engaged in that business, then petitioner's argument falls by its own weight and by the judgment of history. See *License-Tax Cases,* and the other cases cited *supra,* p. 9. See also *James* v. *United States,* 366 U.S. 213; *Rutkin* v. *United States,* 343 U.S. 130.

A basic premise of petitioner's argument is that there is no difference between the government's seeking of information essential for the collection of a tax

and its direct inquiry of individuals in other proceedings (Pet. Br. 9). We submit, however, that cognate differences among the types of governmental inquiries are of considerable relevance in resolving Fifth Amendment claims.

A witness, it has been said, is privileged not to answer a question when that answer might furnish a "link in the chain" of evidence neecssary to prosecution. *Hoffman* v. *United States,* 341 U.S. 479, 486; *Patricia Blau* v. *United States,* 340 U.S. 159. In the *Hoffman* case, the Court made clear that in determining whether a claim of the privilege was proper, "the implications of the question," "the setting in which it is asked," and the "background" and "peculiarities" of the case are to be considered (341 U.S. at 486–487). Privilege cases, such as these, in which tests like "link in the chain" of evidence or "investigatory leads" were applied, generally involved investigations by grand juries or legislative committees—inquisitorial proceedings looking into the very matters as to which the witnesses were being questioned. Such inquiries, like that of calling a defendant to testify in a criminal case, obviously focus on the particular witness whose testimony is sought to be compelled. In such circumstances, the privilege's protection is appropriately invoked at the time of the questioning;[9] "the

[9] In other words, in the context of an inquisitorial proceeding, it is appropriate to focus upon the earlier point of incidence of the privilege (see our brief in *Costello*, pp. 19–20; see also pp. 22–25, *infra*). Such a distinction between types of proceedings, and their purpose, is reflected in congressional enactments. *Compare* 18 U.S.C. 3486, which provides complete transactional

setting in which [the question] * * * is asked" is generally a hostile one, and one in which the witness has been singled out as a possible law violator.

In contrast to a grand jury or legislative investigation—governmental inquiries focusing on the particular individual summoned and questioned—is the inquiry involved in obtaining payment of the excise tax on wagers. If one is liable for the tax, he mails Form 730, with his name, address, tax computation, and check, to the government. No cognizable infringement of the privilege results, in our view, from the government's seeking payment of a valid tax and the minimal information necessary for its collection.[10]

---

immunity from prosecution to a witness who testifies in a congressional investigative proceeding, *with* 49 U.S.C. 9, which provides that any incriminating information obtained incidentally in the context of administering a particular regulatory scheme may not be used against the individual compelled to testify. See also note 15, *infra*.

[10] In this regard, it may be that the occupational tax which requires registration—the two are accomplished through the filing of a single form—should be distinguished from payment of the excise tax and the filing of the return therefor. Thus, should the Court in the *Costello* case uphold the privilege claim as to registration, it does not follow that the privilege should also be held in this case to justify a failure to pay the excise tax. As a practical matter, the possibility of incrimination is less with respect to the excise tax, which requires disclosure of a minimal amount of information, and to which neither the registration provisions (Section 4412) nor the public disclosure provision (Section 6107) relate. However, while no list is maintained of those filing excise tax returns, and the returns themselves are not available for public inspection, such returns may be made available to State and local law enforcement officials on a limited basis upon written authorization, pursuant to 26 U.S.C. 6103; see also 5 U.S.C. 22, 1002(c), and Treas. Reg. § 601.702 (a)(3) and (d).

Such a limited inquiry reflects a purpose and interest separate and independent from that in any particular individual's underlying activity.

By way of further illustration, one may ask: Is a person free to assert the privilege to justify a failure to pay a tax on his residential property, or to file a property tax return calling for his address? Suppose that a local grand jury is investigating prostitution. A person believed to own and reside in a house suspected of being a brothel is summoned and asked to give his address. In that setting, he may be privileged not to answer.[11] We assume he would not, however, be privileged to refuse to pay property taxes on the house if he were the owner, even though such payment might identify him with the suspect activities at the house as surely as would his admission of ownership to the grand jury. Similarly, it is generally required that automobiles be licensed, and information as to the car's body and engine numbers and owner's identification must be furnished. Could one whose previous theft of a car had gone undetected defend a prosecution for driving an unlicensed vehicle on the basis of the privilege?

As these examples indicate, much governmental regulation requires the disclosure of information which, under certain circumstances, might be viewed as having some incriminatory potential. Perhaps in the context of an inquisitorial proceeding, an individual might properly invoke the privilege in refusing to make some such disclosures. This is not neces-

[11] See *Simpson* v. *United States*, 355 U.S. 7, and the government's memorandum filed therein.

sarily so, however, where the setting is a significantly different one. In short, meaningful differences which exist among types of governmental inquiries should not be disregarded in evaluating the substance of privilege claims.

As developed above, the government can, in our view, properly compel payment of a valid tax without running afoul of the privilege. Should the Court disagree, however, and conclude that the limited inquiry involved in collecting the excise tax on wagers is not substantially different from governmental inquiries directed at particular individuals, it does not follow that the Fifth Amendment justifies a failure to pay the tax. The limited nature of the inquiry here, we contend, at least justifies a solution which accommodates both the tax and the privilege. See Point II, *infra*, pp. 18–29.

B. THE PRIVILEGE CLAIM IN REGARD TO PAYMENT OF THE TEN PER CENT EXCISE TAX ON WAGERS IS GOVERNED BY THE DECISIONS IN *KAHRIGER* AND *LEWIS*

Petitioner's argument to the contrary notwithstanding (Pet. Br. 10–14), the decisions in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, encompass the claim of privilege with regard to payment of the excise tax on wagers. Petitioner points out that payment of the excise tax is to be made monthly following the acceptance of wagers, and thus relates to past acts. *Kahriger* and *Lewis* are therefore distinguishable, petitioner contends, since they involved registration and payment of the occupational tax, which relates only to future acts.

While it is doubtless true that the Court emphasized in *Kahriger* and *Lewis* the prospective nature of registration and the occupational tax, the rationale of those decisions, especially that of the *Lewis* case, is broader than petitioner recognizes. In *Lewis* the Court stated, 348 U.S. at 422–423:

> If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, * * * he cannot be compelled to testify and may claim his privilege. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshhold. They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax.

Thus, the Court's holding (as well as the government's principal argument[12]) was that no compulsion within the purview of the Fifth Amendment was involved in the requirement that one comply with the wagering tax laws. Since the statute gave notice of the tax consequences attached to the business of accepting wagers, entry into the business, the Court

[12] See Brief for the United States, *Lewis* v. *United States*, No. 203, Oct. Term 1954, pp. 13–20.

concluded, was a matter of choice. This consideration—not merely a distinction between future and past acts—led to rejection of the Fifth Amendment claim advanced in *Lewis*.[13]

II. EVEN ASSUMING THAT PAYMENT OF THE EXCISE TAX ON WAGERING WOULD PROVIDE INCRIMINATING INFORMATION, THE PROPER REMEDY IS TO BAR THE USE OF SUCH INFORMATION IN ANY CRIMINAL PROSECUTION, RATHER THAN SANCTION A FAILURE TO PAY THE TAX

As developed in Point I, *supra*, the Fifth Amendment cannot, in our view, be relied upon to excuse the failure to pay a valid tax, even should the Court perceive problems of incrimination involved in the registration requirement at issue in the *Costello* case. But should the Court conclude that both registration under the wagering tax laws and payment of the excise tax involve substantial dangers of incrimination so as to bring into play the protections of the Fifth Amendment, this, we submit, would provide an even stronger reason for the adoption of a use-restriction rule suggested alternatively in our brief in *Costello* (pp. 17–25). Rather than repeat our argument in this regard, we incorporate by reference here the argument there developed.

---

[13] So viewed, of course, the decisions in *Kahriger* and *Lewis* are applicable here. However, should *Kahriger* and *Lewis* be overruled in the companion *Costello* case, that result, in our view, would not necessarily be controlling here, for different considerations may apply in evaluating a claim that the privilege excuses not only registration but payment as well. See pp. 7–16, *supra*.

Suffice it to say, in summary, that no incrimination could result from payment of the excise tax [14] so long as the information disclosed is confined to tax purposes, and is not used in a criminal prosecution relating to the underlying activity. As we stated in our brief in *Costello,* an effective proscription on non-tax uses of the information disclosed incident to compliance with the wagering tax laws will accord full protection to an individual's right not to incriminate himself. The need for such a viable accommodation between the individual's rights and the government's interests is, in our view, significantly increased when the privilege is invoked as a justification not only for failure to register, but for failure to pay the tax at all. Striking down the registration requirement, despite its role in the overall administration of the taxing measure, would still leave Congress constitutionally free to levy and collect the tax, but would restrict somewhat the manner in which this could be accomplished. Holding that the privilege excuses failure to pay the tax at all, on the other hand, would be tantamount to deciding that Congress lacked the constitutional power to levy such a tax—and at least some similar excise taxes. Such a sweeping holding, we submit, is unnecessary and would be inappropriate here.

---

[14] We assume, *arguendo*, that the filing of the appropriate return (Form 730, App. B, *infra*) must accompany payment of the excise tax, or that at least some identification of the taxpayer must be provided along with such payment, since a tax measure cannot be effectively administered without obtaining a minimal amount of information from the persons being taxed.

A. ADOPTION OF A USE-RESTRICTION RULE, AS SUGGESTED IN OUR ALTERNATIVE ARGUMENT IN THE COSTELLO CASE, WOULD APPROPRIATELY EFFECTUATE THE PRIVILEGE

As we point out in our brief in *Costello* (pp. 19–23), it would be neither unusual nor unprecedented for this Court to adopt a use-restriction rule such as that which we alternatively suggest there. Petitioner incorrectly characterizes the government's argument in this regard as one suggesting adoption of a rule of immunity. Similarly, petitioner misconstrues this Court's decision in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, and ignores *United States* v. *Blue,* 384 U.S. 251, upon which, along with *Murphy,* we importantly rely in the development of our alternative argument.

We do not at all suggest that this Court adopt a rule immunizing those required to register and pay the excise tax under the wagering tax laws from any prosecution which might be grounded on or make use of information disclosed incident to so doing.[15] If complete immunity is constitutionally required, then, we submit, *Murphy* and *Blue,* and a host of other cases, were wrongly decided. In *Murphy* the Court could simply have held that the witness in the State proceeding need not testify because the State immunity statute did not provide protection against incrimination under federal law, leav-

[15] Most immunity statutes grant complete immunity from prosecution in broad and general terms, and bar the subsequent prosecution of an individual for or on account of anything about which he is compelled to testify (see, *e.g.*, 18 U.S.C. 3486 (1964); see generally Note, 72 Yale L.J. 1568, 1579 (1963)).

ing it to Congress to fashion an immunity statute which would have provided the requisite protection.[16] But there is no gainsaying the fact that the Court in *Murphy* did not do this.[17] Rather, it held that the individual's right not to incriminate himself could be effectively implemented, while at the same time accommodating the governmental interests involved, by prohibiting the federal government from making use of compelled testimony and its fruits in a subsequent criminal prosecution (378 U.S. at 79). Similarly, in *Blue* the Court concluded that an exclusionary rule would adequately protect the Fifth Amendment rights asserted, and would indeed be the "most" to which the taxpayer was entitled (384 U.S. at 255).

---

[16] Congress clearly can prescribe immunity from State as well as federal prosecution, in appropriate circumstances, where a federal instrumentality is seeking to compel information (see, *e.g.*, *Ullmann* v. *United States*, 350 U.S. 422, 436; *Adams* v. *Maryland*, 347 U.S. 179, 183).

[17] *Murphy* itself squarely refutes petitioner's assertion (Pet. Br. 26) that it has always been the legislative branch which has fashioned rules to accommodate the potential collision of Fifth Amendment rights and governmental interests. In *Murphy* the State simply lacked power to grant immunity, legislatively or otherwise, from federal prosecution, or otherwise to accord the necessary protection in that regard (see *United States* v. *Murdock*, 284 U.S. 141, 149; *Jack* v. *Kansas*, 199 U.S. 372, 380). Contrary to petitioner's assertion (Pet. Br. 27), the Court in *Murphy*, recognizing that the State immunity statute could have no effect on federal prosecutions (378 U.S. at 54), proceeded to fashion an exclusionary rule—not a rule of immunity—which would enable the State to conduct its investigation while protecting the witness from being compelled to make incriminating disclosures which might be used against him.

In other cases in which the Court has fashioned an exclusionary rule to protect the Fourth and Fifth Amendment rights involved, *e.g.*, *Weeks* v. *United States*, 232 U.S. 383, *Miranda* v. *Arizona*, 384 U.S. 436, the Court has likewise refrained from holding that a legislatively prescribed immunity from prosecution is constitutionally required. We suggest no more here than the adoption of a similar rule banning the use, direct or indirect, of information obtained incident to compliance with the wagering tax laws in any subsequent State or federal criminal prosecution. This is a step which this Court has repeatedly taken in appropriate circumstances. It would be appropriate here,[18] we submit, since it provides a fair and workable accommodation between the individual's right not to incriminate himself and the government's interest in collecting taxes.

B. THE USE-RESTRICTION RULE SUGGESTED DIFFERS FROM A RULE OF IMMUNITY

To be sure, immunity statutes are commonplace, and the decision to provide immunity has traditionally been one made by the legislative branch. What

[18] Even if *Murphy* is regarded as a decision grounded on considerations of dual sovereignty (a hardly necessary conclusion, in our view; see Mr. Justice White's concurring opinion in *Murphy*, 378 U.S. at 92–107), that does not impair its applicability here. Gamblers like petitioner are quite concerned about possible State prosecution, and claim that such may be materially assisted if they are required to register and pay under the federal wagering tax laws. Indeed, petitioner expressly notes that Pennsylvania prohibits and punishes gambling (Pet. Br. 8). Hence, dual sovereignty considerations are plainly involved here. See our brief in *Costello*, p. 19; see generally Note, 61 Nw. L. Rev. 654 (1966).

we suggest here would not in any sense conflict with the legislature's power to provide for immunity when it chooses to do so.[19] Rather, we are dealing here with a situation in which, like in *Murphy*, no effective immunity has been provided. Where there are substantial governmental interests to be served and where an exclusionary rule will both protect the individual's rights and permit the effectuation of the governmental purpose, it is surely within this Court's power to fashion such a rule.

As a general matter, immunity is legislatively conferred in those situations where obtaining a free flow of information from a particular individual is deemed to outweigh the possible governmental interest in prosecuting that individual for wrongdoing which his testimony might disclose. A different situation is presented, we submit, where the congressional purpose is the collection of an excise tax from a class of individuals and the obtaining of a minimal amount of information in relation thereto so as to permit effective enforcement of the revenue measure involved. In the latter kind of situation, as we develop more fully in our brief in *Costello* (pp. 19–23), focus upon the later point of in-

[19] Where immunity has been conferred by statute, a court is limited to determining whether the scope of the immunity provided effectively supplants the protection of the privilege (see *infra*, p. 25). Here Congress chose not to immunize those registering and paying taxes under the wagering tax laws from prosecution (see note 22, *infra*). It is therefore open to this Court, in our view, to adopt an exclusionary rule—not a rule of complete immunity—which will provide a satisfactory accommodation between the governmental and individual interests involved.

cidence—the "use point"—rather than upon the earlier one ("compulsion point"—is the appropriate way of effectuating the privilege. In our view, therefore, the use-restriction rule suggested in our alternative argument here and in the *Costello* case would, if adopted, be one of limited applicability. As we point out (*supra*, pp. 12–16), when a governmental body focuses its attention upon a certain individual by compelling him to testify, effectuation of the privilege at the earlier incidence better serves to insure full protection of that individual's rights. In such a situation, should another governmental interest be paramount to that in the particular individual's activity, a traditional accommodation is readily available, *i.e.*, enactment of an immunity statute, by which the government grants immunity from prosecution in exchange for the information possessed by the individual. Should the Court now view the wagering tax, and by analogy other similar excise taxes, as involving Fifth Amendment issues, such a drastic accommodation is not an apt or necessary one.

No one questions that it is properly for the States to decide whether gambling should be legal or not, and gamblers punished or not. But in order to levy an excise tax on gamblers, we submit, the federal government should not be forced to choose between taxation and complete immunization from all prosecution, or no taxation at all. Adoption of a use-restriction rule would obviate the need for such a difficult choice, while still according individuals the protection to which the privilege entitles them. Nor, in our view, should Con-

gress be limited to taxing gamblers solely through the income tax when legitimate businessmen have to pay both income and excise taxes.[20]

As petitioner points out, in both *Counselman* v. *Hitchcock*, 142 U.S. 547, and *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, Congress had attempted to provide immunity but, the Court found, had failed to make the immunity sufficiently broad to be coextensive with the scope of the privilege. But those cases hardly support the proposition that this Court cannot, in a situation where Congress has *not* sought to provide immunity, resolve the potentially conflicting individual and governmental interests by adoption of an exclusionary rule such as here suggested. Where Congress has recognized the potential Fifth Amendment problems and determined to confer an immunity, but has failed to make that immunity sufficiently broad to stand this Court's scrutiny, it should be left free to reassess, *i.e.*, to determine whether to confer a sufficiently broad immunity or to abandon the quest for the information. On the other hand, where Congress has not anticipated that any privilege issues might arise, the appropriate result is for the Court, if it perceives such issues, to adopt a

[20] In addition, when the government summons an individual and seeks to compel him to testify, the privilege may, and indeed must, be affirmatively asserted. Such assertion of the privilege may be tested judicially, while the privilege claim in the circumstances here results, as we have stated, in the construction of "conjurer's circle"—the "taxpayer" does nothing, not even paying the tax. Instead, he simply decides unilaterally that he has a constitutional right not to comply with the law.

use-restriction rule which will protect the individual against incrimination and still uphold the substantive legislation. This is particularly so where there is a substantial governmental interest to be served—here the collection of taxes—and where the legislation in question involves the exercise of a governmental power—here the power to tax—separate and independent from the power to regulate the underlying activity to which tax relates. Here the information compelled by the government, particularly the minimal amount of information required in connection with payment of the excise tax, pertains directly to the enforcement of the tax measure; in *Albertson,* contrariwise, the information sought related to the very matters sought to be regulated by Congress, *i.e.,* subversive activities.

C. THE ALTERNATIVE REMEDY PROPOSED DOES NOT CONFLICT WITH THE CONGRESSIONAL DESIGN OF THE WAGERING TAX LAWS

Petitioner repeatedly asserts (Pet. Br. 7, 24, 27, 28) that Congress has specifically negated, by the inclusion of 26 U.S.C. 4422, the conferral of any immunity (or impliedly any restriction on the use of information obtained) incident to registration and payment under the wagering tax laws. In our view, petitioner attempts to extrapolate too much from the congressional inclusion of this section. In addition, contrary to petitioner's characterization and as explained previously (*supra,* pp. 22–25), the government here contends not for a rule of complete immunity, but simply for the adoption of an exclusionary rule similar to that fashioned by this Court in *Murphy.*

Section 4422 simply states that payment of the wagering tax "shall not exempt any person from any penalty provided" by federal or State law for engaging in the activity taxed. A consideration of the bill's legislative history shows that there was some concern that the enactment of an excise tax on wagering might be regarded as placing an implicit stamp of congressional approval on gambling as a legitimate and proper business.[21] Section 4422's inclusion prevents the drawing of any such conclusion. Neither Section 4422 nor any other provision of the statute indicates a congressional preference for a holding of invalidity as opposed to a judicially prescribed exclusionary rule. Adoption of a use-restriction rule, such as here suggested, would in no direct sense "exempt" those required to register and pay the tax from federal or State prosecution for engaging in gambling activities—they would of course be protected against the use of information so obtained—and would thus be wholly consistent with Section 4422.[22]

---

[21] See, *e.g.*, S. Rep. No. 781, 82d Cong., 1st Sess. 113 (1951); H.R. Rep. No. 586, 82d Cong., 1st Sess. 55 (1951); 97 Cong. Rec. 6891, 12238 (1951).

[22] We recognize that there was no mention in the debates or in the committee reports of a congressional recognition of any Fifth Amendment issues which the legislation might create, nor any indication of congressional consideration of whether an immunity statute should or should not have been included. But a consideration of the circumstances surrounding enactment of the legislation shows that this is of little significance. This measure was enacted in 1951. *Twining* v. *New Jersey*, 211 U.S. 78, holding the Fifth Amendment inapplicable to the States, was then the law (not to be overruled until 1964 in *Malloy* v. *Hogan*, 378 U.S. 1; see also *Knapp* v.

Petitioner's rights under the Fifth Amendment will be fully protected if the use-restriction rule which we suggest here and in *Costello* is adopted by this Court. Allowing him to draw a "conjurer's circle" around himself and determine for himself that he need not pay a tax is neither sensible as a matter of policy nor required as constitutional matter. As discussed in our brief in *Costello* (pp. 23–25), the Court, in adopting such a rationale at this time, need not attempt to resolve the various issues which might arise in any subsequent prosecutions of those required to register and pay the tax. We do in our *Costello* brief sketch the outlines of how such a rule might operate (*ibid.*). It is enough to say now that ample precedents exist to provide a framework for resolution of such issues, and the appropriate time for decision of such matters is in those later cases in which they will be concretely presented.

D. ON EITHER APPROACH TAKEN TO THE FIFTH AMENDMENT ISSUE, PETITIONER WAS PROPERLY CONVICTED FOR FAILURE TO PAY THE EXCISE TAX

Petitioner further asserts that, even should this Court adopt such a use-restriction rule, his conviction

---

Schweitzer, 357 U.S. 371; *Feldman* v. *United States*, 322 U.S. 487, likewise overruled 1964 in *Murphy* v. *Waterfront Commission*, *supra*). There was then little federal legislation seeking to proscribe and punish certain interstate aspects of gambling. Whatever potential incrimination might have been involved in registering and paying the tax would, at that time, have been under State gambling statutes. See S. Rep. No. 781, *supra*, 113; H.R. Rep. No. 586, *supra*, 55. There was little reason for Congress to concern itself, therefore, with any potential Fifth Amendment problems when it enacted the wagering tax.

should be reversed. Petitioner seeks to distinguish his situation from that of petitioner in the *Costello* case on the ground that "there were no decisions of this Court holding that he had no constitutional privilege to refuse to pay" (Pet. Br. 28). Apart from the general presumption of validity attaching to congressional enactments, and the accepted view that those required to pay a tax cannot with impunity refuse to pay such tax unless and until this Court holds that tax valid, it seems patent that this contention must fail. As shown *supra*, pp. 16–18, petitioner construes this Court's decisions in *Kahriger* and *Lewis* too narrowly. And since, in any event, under those decisions petitioner had no Fifth Amendment right not to comply with the registration requirement, he could hardly have concluded that *payment* of the tax was somehow excused. Petitioner's failure to pay was unlawful and known by him to be so; indeed, petitioner testified that he knew of the enactment of the wagering tax laws and his defense at trial was that he ceased engagement in gambling activities in 1950 (R. 104–105; see *supra*, p. 3). Petitioner apparently concedes that his conviction should be affirmed if this Court holds that the Fifth Amendment does not protect him from the requirement to pay the excise tax. No different result should follow, we submit, if this Court adopts the alternative rationale suggested here and in *Costello*. Rather than elaborate, we incorporate by reference our discussion in the *Costello* brief (pp. 25–26) on this point.

III. REVERSIBLE ERROR CANNOT BE PREDICATED ON THE TRIAL JUDGE'S TREATMENT OF A NOTE FROM THE JURY

A. The case was submitted to the jury on the afternoon of Wednesday, March 4, 1964. The jury deliberated until about 11:00 p.m. that evening (R. 84), when it retired. The following day, at about 11:30 a.m., after having deliberated for a few hours in the morning, the jury sent a note to the judge in which they indicated that they could not agree (R. 84, 70). The judge instructed the bailiff to tell the jury to continue deliberating (R. 84). About forty-five minutes later, defense counsel was informed of the note and response (R. 41, 84).

The jury continued deliberating until 11:00 that evening (R. 42). As the jury was leaving to retire for the night, one juror was injured slightly on her way to the elevator (R. 42); counsel were immediately informed (R. 42). Shortly thereafter a second juror became ill (R. 42–43). A physician was called and the jurors were given medical attention (R. 43).

The jury did not deliberate the next day, Friday. At a conference that day, petitioner's counsel moved for a mistrial and for the discharge of the jury on the ground that, because of the illness of a juror, further deliberations might result "in some sort of a compromise verdict" (R. 41). The court denied the motion for a mistrial (R. 44). Thereafter there was a discussion as to whether any instructions should be reread when the jury returned for its deliberations (R. 46–48). The judge indicated that he was not in-

clined to reread any of the charge but that, if the jury were still in disagreement the following afternoon, he might ask them if there was any possibility of their reaching a verdict—to which defense counsel responded "I have no objection to that" (R. 47).

The jury resumed its consideration of the case the next day, Saturday (R. 52). At a conference that afternoon, defense counsel renewed his motion for a mistrial on the ground that one of the jurors who had received medical attention was not in a condition to participate in deliberations (R. 52–53). After some discussion, the motion was denied (R. 59). Counsel and the court then discussed whether the jury should deliberate on Sunday. During that conference, the bailiff handed the judge a note from the jury which read (R. 60):

> I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request.

The following colloquy ensued (R. 60–61):

> The COURT. * * * We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So I think we will just tell them we got their message and tell them to keep on working.
>
> Are there any further suggestions from anyone?

Mr. McLaughlin [defense counsel]. Well, we have already moved for a mistrial.

The Court. Tell them I have got their message and I suggest they keep on working.

The Bailiff. All right.

Mr. McLaughlin. Your Honor, I don't know what the technicalities of it are, but if they are going around and if they are going to be kept together, they may as well deliberate on Sunday as not.

A few hours later, on Saturday evening, the jury returned its verdict (R. 61–65).

In a motion for a new trial, filed three days later, the defense contended, *inter alia,* that the court erred in accepting, and replying to, a communication from the jury in the absence of the defendant and his counsel, and in not making the first note a part of the record (R. 83). At the hearing on the motion the court commented that that note had stated only that the jury could not agree, and that it was a "mere oversight" that the note had not been shown to counsel. The court also adverted to the second note and stated that the two notes were in substance the same (R. 70). Counsel then suggested that perhaps the clerk had the two notes; the judge responded that he did not know whether the clerk had the notes but that both notes stated only that the jury could not agree (*ibid*). Counsel then proceeded to reargue his motion for a mistrial on the ground of the illness of a juror (R. 70–71). Apparently the first note had in fact been discarded.

B. The first mention of the issue of an improper communication to the jury came not when defense counsel was notified of the first note and response some forty-five minutes after the incident, nor the following day when counsel and the court conferred regarding the illness of a juror, nor when a similar second note was received. The point was made only after verdict, and then in a *pro forma* manner. At the time he learned of the first note and response, defense counsel did not seek to ascertain the contents of the note, or notify the judge of his objection so that the judge might preserve the note. And when the second note was received, counsel did not object to the judge's method of handling the situation—by having the bailiff relate to the jury that the judge felt they should keep on working. Thus, having waited silently until after the verdict, petitioner is in no position now to have the five-week trial declared for naught on this ground. See *United States* v. *Gersh,* 328 F. 2d 460, 463–464 (C.A. 2), certiorari denied *sub nom. Mugnola* v. *United States,* 377 U.S. 992; *United States* v. *Woodner,* 317 F. 2d 649, 651–652 (C.A. 2), certiorari denied, 375 U.S. 903; *United States* v. *McGrady,* 191 F. 2d 829, 831 (C.A. 7), certiorari denied, 342 U.S. 911; *United States* v. *Coduto,* 284 F. 2d 464, 468 (C.A. 7), certiorari denied, 365 U.S. 881; *United States* v. *Sorcey,* 151 F. 2d 899, 903 (C.A. 7), certiorari denied, 327 U.S. 794.

Moreover, even assuming that the judge's informal procedure in answering the first note was erroneous, it does not warrant reversal of the conviction. See *Walker* v. *United States,* 322 F. 2d 434 (C.A.D.C.), certiorari denied, 375 U.S. 976; *Johnson* v. *United*

States, 270 F. 2d 721, 725 (C.A. 9), certiorari denied, 362 U.S. 937; *United States* v. *Compagna,* 146 F. 2d 524, 528 (C.A. 2), certiorari denied, 324 U.S. 867; *Outlaw* v. *United States,* 81 F. 2d 805, 808 (C.A. 5), certiorari denied, 298 U.S. 665; *United States ex rel. Shapiro* v. *Jackson,* 263 F. 2d 282, 283 (C.A. 2); *Bacino* v. *United States,* 316 F. 2d 11, 14 (C.A. 10), certiorari denied, 375 U.S. 831. Manifestly, the communication in this case—"keep on working"—is totally different from those condemned in *Remmer* v. *United States,* 347 U.S. 227, and in *Shields* v. *United States,* 273 U.S. 583, in which the judge gave a legally erroneous and arguably coercive response to a jury's note.

Petitioner contends that the rule is, or should be, that reversal is required where there is a communication to the jury without the defendant's being present, unless the absence of prejudice is affirmatively shown on the record (Pet. Br. 34). He then relies upon (1) the absence of the first note in the record, and (2) "horribles" (Pet. Br. 39) he constructs which might arise from the use of the bailiff as a messenger. However, as we have shown, petitioner made no attempt to see that the note was preserved, and did not object to the use of the bailiff in responding to the second note. Accordingly, whatever merit petitioner's statement of the rule might have in cases where the defense has seasonably objected and when the objectionable incident is more highly suspect, it should have no application in the circumstances here.[23]

[23] Unlike *Parker* v. *Gladden,* No. 81, this Term, decided December 12, 1966, there is no factual basis here upon which to find any likelihood of prejudice resulting from the bailiff's com-

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
FRANCIS X. BEYTAGH, JR.,
J. NICHOLAS MCGRATH, JR.,
Assistants to the Solicitor General.
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

DECEMBER 1966.

---

munication to the jury. In virtually every jury case, a bailiff has unsupervised contact with the jury during the period of their deliberation. Idle speculation as to possible misconduct and possible prejudice arising during that contact certainly is an insufficient basis upon which to set aside a conviction, where substantiation in the record is wholly lacking, and where the defense did not attempt to establish the claim as a ground for relief by, for example, calling the bailiff as a witness at the hearing on the post-trial motion.

APPENDIX A

INTERNAL REVENUE CODE OF 1954

Section 4401 provides:

Wagers.

(*a*) There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

Amount of wager.

(*b*) In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

Persons liable for tax.

(*c*) Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

Section 4402 provides:

Exemptions.

No tax shall be imposed by this subchapter—

(1) *Parimutuels.*

On any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law,

(2) *Coin-operated devices.*

On any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 4461, or on any amount paid, in lieu of inserting a coin, token, or similar object, to operate a device described in section 4462(a)(2) if an occupational tax is imposed with respect to such device by section 4461, or

(3) *State-conducted sweepstakes.*

On any wager placed in a sweepstakes, wagering pool, or lottery—

(A) which is conducted by an agency of a State acting under authority of State law, and

(B) the ultimate winners in which are determined by the results of a horse race,

but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

Section 4421 provides:

Definitions.

For purposes of this chapter—

(1) *Wager.*

The term "wager" means—

(A) any wager with respect to a sports event or contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) *Lottery.*

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include—

(A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

Section 4422 provides:

Applicability of federal and state laws.

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

Section 6107 provides:

In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officers of any State, county,

or municipality there shall be furnished to him a certified copy thereof, as a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

Section 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

TREASURY REGULATION

Section 44.6011(a)–1(a) provides:

> Every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by §§ 44.4403-1 and 44.6001.1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. A return shall be made for each month whether or not liability has been incurred for that month. If the taxpayer ceases operations which make him liable for the tax, the last return shall be marked "Final Return."

APPENDIX B

FORM 730 (Rev. Sept. 1960)
U. S. Treasury Department
Internal Revenue Service

I declare under the penalties of per
any accompanying certificates and st
by me and to the best of my knowlec
and complete return.

(Signed) .....

(Title) .....
(Owner, president, pa

(THIS SPACE FOR NAME, ADDRES

ORIGINAL RETURN.—This form must be filed,

and shall retain a copy of the certificate furnished t
lay-off wager.

4. CREDITS.—(*a*) *General credits.*—Any perso
due with one monthly return may take credit for t
the tax due with any subsequent monthly return.
statement fully explaining the reason such credit
tached to the return. This statement should also sho
claim for credit or refund covering the amount
thereof, has been filed; and should list each amount
the credit, monthly return on which reported, date
tax was paid with respect to more than 1 month, t
credit chargeable to each month. A complete and
credits must be kept by the taxpayer for a period of
date the credit was taken. No credit shall be allow
provided in the succeeding paragraph), whether i
decision or otherwise, unless the taxpayer establish
collected the tax either as a separate charge or as
respect to which it was imposed, or (2) that he ha
the tax to the person making the wager or has secu
of such person to the allowance of the credit. If th
payment of tax with respect to a laid-off wager,
establish that the tax was not collected by any perso
the tax has been refunded to the person who place
or that he has secured the written consent of such p
of the claim.

(*b*) *Lay-off credits.*—Under section 6419 (b) a
a taxpayer for tax paid by him or tax due with re
such wager was laid off with another taxpayer who
respect to such laid-off wager. If such a credit is ta

U.S. GOVERNMENT PRINTING OFFICE: 1960

SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1967.

Anthony M. Grosso, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January 29, 1968.]

Mr. Justice Harlan delivered the opinion of the Court.

Petitioner was convicted in the United States District Court for the Western District of Pennsylvania of 15 counts of willful failure to pay the excise tax imposed on wagering by 26 U. S. C. § 4401, four counts of willful failure to pay the special occupational tax imposed by 26 U. S. C. § 4411, and one count of conspiracy to defraud the United States by evading payment of both taxes. 18 U. S. C. § 371. Petitioner moved before trial to dismiss the counts which charged conspiracy to defraud and failure to pay the excise tax, asserting that payment would have obliged him to incriminate himself, in violation of the privilege against self-incrimination guaranteed by the Fifth Amendment. He reiterated this contention in support of unsuccessful motions for acquittal after verdict and for a new trial. The Court of Appeals for the Third Circuit affirmed the conviction. 358 F. 2d 154.

Petitioner did not assert below, and therefore has not urged here, that his privilege was violated by reason of his conviction for failure to pay the special occupational tax. He has contended only that payment of the excise tax would have required him to incriminate himself, that he therefore may not properly be prosecuted for willful failure to pay the tax or for conspiracy to evade its pay-

ment, and that conduct of the trial court after submission of the case to the jury denied him a fair trial. We granted certiorari, 385 U. S. 810, and the case was argued with *Marchetti* v. *United States*, decided today, *ante*, p. ——.[1] For reasons which follow, we reverse.

I.

We turn first to petitioner's contention that payment of the wagering excise tax would have compelled him to incriminate himself. We have summarized in *Marchetti, supra*, the various state and federal penalties which have been imposed upon wagering. It is enough now to reiterate that Pennsylvania, in which petitioner allegedly accepted wagers, has adopted a comprehensive statutory system for the punishment of gambling and ancillary activities. Pa. Stat. Ann., Tit. 18, §§ 4601–4607 (1963). These penalties, in combination with the federal statutes described in *Marchetti*, place petitioner entirely within "an area permeated with criminal statutes," where he is "inherently suspect of criminal activities." *Albertson* v. *SACB*, 382 U. S. 70, 79. The issues here are therefore whether payment of the excise tax would have provided information incriminating to petitioner, and, if it would have done so, whether petitioner is otherwise prevented from asserting the constitutional privilege.

[1] After argument, the case was returned to the calendar, and set for reargument at the 1967 Term, again with *Marchetti, supra*. 388 U. S. 904. Counsel were asked to argue, in addition to the original questions, the following: "(1) What relevance, if any, has the required records doctrine, *Shapiro* v. *United States*, 335 U. S. 1, to the validity under the Fifth Amendment of the obligation to pay the wagering excise tax imposed by 26 U. S. C. § 4401? (2) Is satisfaction of an obligation to pay a wagering excise tax imposed by 26 U. S. C. § 4401 conditioned upon the filing of a return required under 26 U. S. C. § 6011 and pertinent regulations? If it is not, what information, if any, must accompany the the payment of a wagering excise tax obligation in order to extinguish the taxpayer's liability for that obligation?"

The statutory scheme by which wagering is taxed is described in *Marchetti, supra.* Two additional observations are, however, required in order to assess fully the hazards of self-incrimination created by the wagering excise tax. First, those liable for payment of that tax are required to submit each month Internal Revenue Service Form 730. Treas. Reg. § 44.6011 (a)–1 (a). The return is expressly designed for the use only of those engaged in the wagering business; its submission, and the replies demanded by each of its questions, evidence in the most direct fashion the fact of the taxpayer's wagering activities. Although failures to pay the excise tax and to file a return are separately punishable under 26 U. S. C. § 7203, the two obligations must be considered inseparable for purposes of measuring the hazards of self-incrimination which might stem from payment of the excise tax. Nothing in the pertinent statutes or regulations contemplates payment of the tax without submission of the return,[2] and we are informed by the United States that if the return does not accompany the tax payment, "the money is not accepted." Brief for the United States on Reargument 39, n. 35. We must conclude that here, as in *Albertson,* the validity under the Constitution of criminal prosecutions for willful failure to pay the excise tax may properly be determined only after assessment of the hazards of incrimination which would result from "literal and full compliance" with all the statutory requirements. 382 U. S., at 78.

Second, although there is no statutory instruction, as there is for the occupational tax, that state and local prosecuting officers be provided listings of those who have paid the excise tax, neither has Congress imposed explicit restrictions upon the use of information obtained

[2] Indeed, so far as the pertinent materials can be said to reflect any position, it is that a return must accompany a tax payment. See 26 U. S. C. § 6011; Treas. Reg. § 44.6011 (a)–1 (a).

as a consequence of payment of the tax. Moreover, it appears that the Revenue Service, evidently acting under the authority of certain general statutory provisions,[3] has undertaken to tender this information to interested prosecuting authorities.[4] We can only conclude that those liable for payment of the excise tax reasonably may expect that information obtainable from its payment, or from submission of Form 730, will ultimately be proffered to state and federal prosecuting officers.

In these circumstances, it would be impossible to say that the hazards of incrimination which stem from the obligation to pay the excise tax and to file Form 730 are "imaginary and unsubstantial." *Reg.* v. *Boyes*, 1 B. & S. 311, 330; *Brown* v. *Walker*, 161 U. S. 591, 599–600. The criminal penalties for wagering with which petitioner is threatened are scarcely "remote possibilities out of the ordinary course of the law," *Heike* v. *United States*, 227 U. S. 131, 144; yet he is obliged, on pain of criminal prosecution, to provide information which would readily incriminate him, and which he may reasonably expect would be provided to prosecuting authorities. These hazards of incrimination can only be characterized as "real and appreciable." *Reg.* v. *Boyes*, *supra*, at 330; *Brown* v. *Walker*, *supra*, at 599–600.

---

[3] The United States has suggested that the Commissioner has authority to make information obtained as a result of the excise tax available to prosecuting officers under 26 U. S. C. § 6103; 5 U. S. C. §§ 22, 1002 (c), and Treas. Reg. §§ 601.202 (a) (3) and (d). Brief for the United States 14, n. 10. But see Transcript of Record 101–102.

[4] See *State* v. *Mills*, 229 La. 758, 86 So. 2d 895; *State* v. *Baum*, 230 La. 247, 88 So. 2d 209; *Boynton* v. *State*, 75 So. 2d 211, 213; *United States* v. *Whiting*, 311 F. 2d 191, 193. And see Caplin, The Gambling Business and Federal Taxes, 8 Crime & Delinquency 371, 372. Further, we note that the United States has acknowledged the "limited availability" of the excise tax returns, "in certain circumstances," to state and local officials. Brief on Reargument 33, n. 30.

Moreover, unlike the income tax return at issue in *United States* v. *Sullivan*, 274 U. S. 259, petitioner's submission of an excise tax payment, and his replies to the questions on the attendant return, would directly and unavoidably have served to incriminate him; his claim of privilege as to the entire tax payment procedure was therefore neither "extreme" nor "extravagant." Compare, *id.*, at 263.

We are thus obliged to inquire whether petitioner is otherwise foreclosed from asserting the constitutional privilege. For reasons indicated in *Marchetti, supra*, we have found nothing in *United States* v. *Kahriger*, 345 U. S. 22, or *Lewis* v. *United States*, 348 U. S. 419, which now warrants the exclusion of this situation from the privilege's protection.[5] It need only be added that the requirements associated with the excise tax are directed wholly to past and present wagering activities; they lack even the illusory prospectivity which characterizes the special occupational tax and registration requirements.

Similarly, we have concluded that the "required records" doctrine, *Shapiro* v. *United States*, 335 U. S. 1, cannot be appropriately applied to these circumstances. See generally *Marchetti* v. *United States, supra*. The premises of the doctrine, as it is described in *Shapiro*, are evidently three: first, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed "public aspects" which render them at

[5] It is useful to note that the validity under the Fifth Amendment of the wagering excise tax was not at issue in either *Kahriger* or *Lewis*; *Lewis* involved an information which charged a willful failure to pay the occupational tax, and *Kahriger* an information which charged willful failures both to register and to pay the occupational tax.

least analogous to public documents. There is no need for present purposes to examine the relative significance of these three factors, or to undertake to define more specifically their incidents, for both the first and third factors are plainly absent from this case.

Here, as in *Marchetti*, the statutory obligations are directed almost exclusively to individuals inherently suspect of criminal activities. The principal interest of the United States must be assumed to be the collection of revenue, and not the prosecution of gamblers, *Calamaro* v. *United States*, 354 U. S. 351, 358; but we cannot ignore either the characteristics of the activities about which information is sought, or the composition of the group to which the inquiries are made. These collateral circumstances, in combination with Congress' apparent wish that any information obtained as a consequence of the wagering taxes be made available to prosecuting authorities, readily suffice to distinguish these requirements from those at issue in *Shapiro*. Moreover, the information demanded here lacks every characteristic of a public document. No doubt it is desired by the United States, but we have concluded, for reasons indicated in *Marchetti*, that this alone does not render information "public," and thus does not deprive it of constitutional protection.

We must note that the pertinent Treasury regulations provide that the replies to the questions included on Form 730 are to be compiled each month "from the daily records required by §§ 44.4301–1 and 44.6000–1." Treas. Reg. § 44.6011 (a)–1 (a). It might therefore be argued that Form 730 is merely a monthly abstract of records essentially similar to those required to be preserved by the regulations in *Shapiro*. The difficulties with this argument are two. First, it is scarcely plain that the records required here are "of a kind [the taxpayer] has customarily kept." 335 U. S., at 5. Second, and more important, there are, as we have indicated,

other points of significant dissimilarity between this situation and that in *Shapiro*. We have concluded that in combination these points of difference preclude any appropriate application to these circumstances of the "required records" doctrine.

Finally, as in *Marchetti*, we have been urged by the United States to permit continued enforcement of the wagering excise tax requirements by imposing restrictions upon the use by state and federal authorities of information obtained as a consequence of payment of the tax. We recognize that § 6107 (see *Marchetti, ante*, p. 19, n. 14) is not by its terms applicable to the excise tax, and that there is no similar statutory obligation that the Commissioner provide prosecutors with listings of those who have paid the excise tax. Nonetheless, it would be inappropriate to impose such restrictions upon one portion of a statutory system, when we have concluded that it would be improper, for reasons discussed in *Marchetti*, to do so upon "an integral part" [6] of the same system. We therefore decline to impose the restrictions urged by the United States.

II.

There remains for disposition the substantive counts for willful failure to pay the occupational tax, and the count for conspiracy to defraud.[7] The latter was bot-

---

[6] H. R. Rep. No. 586, 82d Cong., 1st Sess., 60.

[7] Section 4411 provides that the occupational tax must be paid "by each person who is liable for tax under section 4401" and by each person who receives wagers for one liable under § 4401. It might therefore be argued that since petitioner is entitled to claim the constitutional privilege in defense to a prosecution for willful failure to pay the excise tax, he is thereby freed from liability for the occupational tax. We cannot accept such an argument. We do not hold today either that the excise tax is as such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation; we hold only that such a claim of

tomed on allegations that petitioner had conspired to evade payment both of the excise tax and of the occupational tax. Petitioner has consistently contended that the constitutional privilege should have prevented his conviction on the conspiracy count, evidently on the basis that, insofar as it is founded on his failure to pay the excise tax, this count raises questions identical with those presented by the substantive counts for failure to pay that tax. We agree, and conclude that a taxpayer may not be convicted of conspiracy to evade payment of the tax, if the constitutional privilege would properly prevent his conviction for willful failure to pay it. Cf. *Marchetti* v. *United States, supra,* at 20.

Petitioner has not, however, asserted a claim of privilege either as to the counts which charged willful failure to pay the occupational tax, or as to the allegation that he conspired to evade payment of the occupational tax.[8] Given the decisions of this Court in *Kahriger* and *Lewis, supra,* which were on the books at the time of petitioner's trial, and left untouched by *Albertson* v. *SACB, supra,* we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege. By the same token, we do not think that we can well reach these counts on the theory of "plain error."

---

privilege precludes a criminal conviction premised on failure to pay the tax.

[8] It should be noted that petitioner's trial counsel did once assert, in colloquy with the trial judge, that "We contended and have always contended—and if required to go on appeal will continue to contend—that the requirements of this Act in requiring you to pay this excise tax and take out the stamp are a violation of the privilege against self-incrimination." The court then inquired, "You are raising the Constitutional question of the validity of the law?" Petitioner's counsel replied, "That is right." Transcript of Record 33. Petitioner did not, however, challenge his obligation to pay the occupational tax either in any of his various motions or in any of his other arguments, here or in the courts below.

It might, therefore, be thought that the proper disposition of the substantive occupational tax counts, and of the portion of the conspiracy count concerned with the occupational tax, would be to vacate, rather than to reverse, the judgments of conviction, and to return the case to the lower courts for further proceedings consistent with our opinions in this case and in *Marchetti*.

We think, however, that a different course is indicated. Under 28 U. S. C. § 2106 [9] we have power to dispose of this case "as may be just under the circumstances." See *Yates* v. *United States*, 354 U. S. 298, 327–331. Since the record is barren of any evidence on which a finding of waiver of the privilege against self-incrimination might properly be predicated, and since, absent such a waiver, reversal of the conviction would be inevitable in light of our holdings today in this case and in *Marchetti*, we consider that the entire case should now be finally disposed of at this level. In the special circumstances presented, this course seems to us to be dictated by considerations of sound judicial administration, in order to obviate further and entirely unnecessary proceedings below.[10] Cf. *Yates* v. *United States*, *supra*.

Accordingly, the judgment of the Court of Appeals is reversed in its entirety.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

---

[9] Section 2106 provides that "The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

[10] In light of this disposition, we find it unnecessary to reach petitioner's alternative contention, that conduct of the trial judge after submission of the case to the jury prevented a fair trial.

SUPREME COURT OF THE UNITED STATES

Nos. 2 AND 12.—OCTOBER TERM, 1967.

James Marchetti, Petitioner, 2 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
Anthony M. Grosso, Petitioner, 12 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January 29, 1968.]

MR. JUSTICE BRENNAN, concurring.

I join the opinions of the Court in these cases. I write only to emphasize why, in my view, nothing we decide or say today in any wise impairs or modifies *United States* v. *Sullivan*, 274 U. S. 259, and *Shapiro* v. *United States*, 335 U. S. 1.

The privilege against self-incrimination does not bar the Government from establishing every program or scheme featured by provisions designed to secure information from citizens to accomplish proper legislative purposes. Congress is assuredly empowered to construct a statutory scheme which either is general enough to avoid conflict with the privilege, or which assures the necessary confidentiality or immunity to overcome the privilege. See *Adams* v. *Maryland*, 347 U. S. 179; *Reina* v. *United States*, 364 U. S. 507. True, some of the values protected by the self-incrimination guaranty may well be affected to an extent by any enforced system of information gathering based upon individual participation, see *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55, but it is clear that the scope of the privilege does not coincide with the complex of values it helps to protect.

Despite the impact upon the inviolability of the human personality, and upon our belief in an adversary system of criminal justice in which the Government must produce the evidence against an accused through its own independent labors, the prosecution is allowed to obtain and use evidence offered by the accused "in the unfettered exercise of his own will." *Malloy* v. *Hogan*, 378 U. S. 1, 8, and evidence which although compelled is generally speaking not "testimonial," *Schmerber* v. *California*, 384 U. S. 757, 761. Moreover, by the simple expedient of granting appropriate immunity the Government is able to surmount entirely the self-incrimination barrier, despite the value of privacy that provision is intended to protect.

United States v. *Sullivan, supra,* makes clear that an individual is not exempted, by the fact that he may be privileged to refuse to answer some questions, from a requirement, "directed at the public at large," of filing an income tax return exclusively containing questions "neutral on their face." *Albertson* v. *SACB*, 382 U. S. 70, 79. *Shapiro* v. *United States, supra,* involved a similar situation; it involved a record-keeping requirement pursuant to a neutral governmental system of price regulation.

On the other hand, we know that where the governmental scheme clearly evidences the purpose of gathering information from citizens in order to secure their conviction of crime, it contravenes the privilege. Thus in *Albertson* v. *SACB, supra,* we held invalid both the requirement that Communist Party members file a registration form and that they complete and file a registration statement under the Subversive Activities Control Act of 1950. We distinguished *Sullivan,* stating that the questions on the forms in *Albertson* "are directed at a highly selective group inherently suspect of criminal activities," and that the privilege is asserted, not "in

an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." *Id.*, at 79.

The cases before us present a statutory system condemned by *Albertson*. The wagering excise tax, the occupational tax, and the registration requirement are only parts of an interrelated statutory system for taxing illegal wagers. Whatever else Congress may have meant to achieve, an obvious purpose of this statutory system clearly was to coerce evidence from persons engaged in illegal activities for use in their prosecution. See *United States* v. *Kahriger*, 345 U. S. 22, 37 (Frankfurter, J., dissenting).

The Court's opinions fully establish the statutory system's impermissible invasions of the privilege. Indeed, § 4401 should create substantial suspicion on privilege grounds simply because it is an excise tax upon persons "engaged in the business of accepting wagers" or who conduct "any wagering pool or lottery." The persons affected by this language are a relatively small group, many of whom are engaged in activities made unlawful by state and federal statutes. But § 4401 is actually even more directly confined to that group. Section 4402 (1) exempts from the tax wagers placed with a parimutuel wagering enterprise "licensed under State law," and § 4421 defines "wager" to exclude most forms of unorganized gambling such as dice and poker, and defines "lottery" to exclude commonly played games such as bingo and drawings conducted by certain tax-exempt organizations. The effect of these exceptions is to limit the wagering excise tax under § 4401 almost exclusively to illegal, organized gambling.

Moreover, the code contemplates extensive record-keeping reporting by persons obligated to pay the tax.

But these are records and reports which would incriminate overwhelmingly. Section 6011 (a) requires any person liable to pay a tax to file a return in accordance with the forms and regulations promulgated by the Secretary or his delegate. The regulations promulgating record-keeping requirements and the requirement that taxpayers make a monthly return on Form 730, Treas. Reg. § 44.6011 (a)–1(a), were therefore formulated pursuant to specific congressional authority. That the return is intended to be a part of the wagering tax obligation is clear from the face of the return itself. Immediately under Form 730's title "TAX ON WAGERING" is a reference to "(Section 4401 of the Internal Revenue Code)," and in at least three places the return indicates that "this form must be filed, *with remittance*, with the District Director of Internal Revenue."* (Emphasis added.)

Thus § 4401 requires both that taxpayers send the Government every month the tax due, and the completed Form 730. That much can start them on the road to prison. The Service then is free to take various steps to assure that it does. It may investigate such taxpayers. It may subpoena the taxpayer's records to ascertain whether the payment is accurate. It can and does pass on for use by prosecuting authorities the facts of payment and filing and any other evidence uncovered. These many, substantial dangers easily satisfy the test for incrimination fashioned by our cases.

Of course the privilege does not guarantee anonymity. The question in these cases, however, is not whether all governmental programs which require citizens to expose their identity are invalid, but whether this statutory sys-

*The instructions on Form 730 state that the "[r]eturn, with remittance, covering the tax due under section 4401 for any calendar month must be in the hands of the District Director . . . on or before the last day of the succeeding month . . . ."

tem, designed primarily for and utilized to pierce the anonymity of citizens engaged in criminal activity, is invalid. The privilege does guarantee anonymity from inquiries so designed, when the risks are not wholly fanciful. And the risks here are obvious and real. A list of persons who comply with § 4401 every month is invaluable to prosecuting authorities. It must frequently provide the clinching link in the chain of conviction.

We must take this statute as it is written and as it has been applied. Both the statute and the practice under it clearly further a congressional purpose to gather evidence from citizens in order to secure their conviction of crime. There undoubtedly will be other statutes and practices as to which this determination will be more difficult to make. These cases, however, present a statutory system manifesting a patent violation of the privilege. That system must be dealt with uncompromisingly to protect against encroachment of the privilege and to encourage legislative care and concern for its continuing vitality.

SUPREME COURT OF THE UNITED STATES

Nos. 2 AND 12.—OCTOBER TERM, 1967.

James Marchetti, Petitioner, 2 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
Anthony M. Grosso, Petitioner, 12 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January 29, 1968.]

MR. JUSTICE STEWART, concurring.

If we were writing upon a clean slate, I would agree with the conclusion reached by THE CHIEF JUSTICE in these cases.[1] For I am convinced that the Fifth Amendment's privilege against compulsory self-incrimination was originally meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding.[2] But the Court long ago lost sight of that original meaning. In the absence of a fundamental re-examination of our decisions, the most relevant recent one being *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70, I am compelled to join the opinions and judgments of the Court.

---

[1] And in *Haynes* v. *United States*, *post*, p. —.

[2] That, after all, is what the clause says:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

SUPREME COURT OF THE UNITED STATES

Nos. 2 AND 12.—OCTOBER TERM, 1967.

James Marchetti, Petitioner, 2 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
Anthony M. Grosso, Petitioner, 12 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January 29, 1968.]

MR. CHIEF JUSTICE WARREN, dissenting in Nos. 2 and 12.

The Court today strikes down as unconstitutional a statutory scheme enacted by Congress to make effective and enforceable taxes imposed on wagers and the occupation of gambling. In so doing, it of necessity overrules *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 348 U. S. 419 (1955). I cannot agree with the Court's conclusion on the constitutional questions presented, and I would affirm the convictions in these two cases on the authority of *Kahriger* and *Lewis*.

In addition to being in disagreement with the Court on the result it reaches in these cases, I am puzzled by the reasoning process which leads it to that result. The Court professes to recognize and accept the power of Congress legitimately to impose taxes on activities which have been declared unlawful by federal or state statutes. Yet, by its sweeping declaration that the congressional scheme for enforcing and collecting the taxes imposed on wagers and gamblers is unconstitutional, the Court has stripped from Congress the power to make its taxing scheme effective. A reading of the registration require-

ment of 26 U. S. C. § 4412, as implemented by Internal Revenue Service Form 11-C, reveals that the information demanded of gamblers is no more than is necessary to assure that the tax-collection process will be effective. Registration of those liable for special taxes is a common and integral feature of the tax laws. See 26 U. S. C. § 7011.[1] So also is the requirement of public disclosure.[2] And the reach of the registration and disclosure requirements extends to both lawful and unlawful activities. Because registration and disclosure are so pervasive in the Internal Revenue Code, it is clear that such requirements have been imposed by Congress to aid in the collection of taxes legitimately levied. Because most forms of gambling have been declared illegal in this country, gamblers necessarily operate furtively in the dark shadows of the underworld. Only by requiring that such individuals come forward under pain of criminal sanctions and reveal the nature and scope of their activities can Congress confidently expect that revenue derived from that outlawed occupation will be subject to the legitimate reach of the tax laws. Indeed, it seems to me that the very secrecy which surrounds the business of gambling demands disclosure. Those legislative committees and executive commissions which have studied the problems of illicit gambling activities have found it impossible to determine with any precision the gross revenues derived from that business. For example, the

[1] It is true that the Internal Revenue Code also imposes special registration requirements in connection with some of the special taxes. See the registration sections collected in 26 U. S. C. § 7012. However, the special registration requirements differ only in degree, and not in kind, from the provisions of § 7011.

[2] Among the more general public disclosure provisions of the Revenue Code are § 6103 (f) (list of taxpayers); § 6104 (returns of certain tax-exempt organizations); and § 6105 (lists of those who have been granted excess profit relief).

President's Commission on Law Enforcement and Administration of Justice reported:

> "There is no accurate way of ascertaining organized crime's gross revenue from gambling in the United States. Estimates of the annual intake have varied from $7 to $50 billion. . . . While the Commission cannot judge the accuracy of these figures, even the most conservative estimates place substantial capital in the hands of organized crime leaders." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime 3 (1967).[3]

The Commission's observation is doubly revealing. It shows that the business of gambling is a lucrative revenue source. And it demonstrates the need for an enforceable disclosure device, such as the registration requirement of § 4412, if the revenue potential is to be realized. No one denies that the disclosures demanded by § 4412 can also be useful to law enforcement officials and that the very process of disclosure may have a regulatory effect on gamblers and their operations.[4] But this Court has

---

[3] Other reports are similarly indefinite concerning the precise amount of revenue realized by organized crime from illicit gambling operations. Thus, a Senate report could be no more exact than to describe unlawful gambling activities as "a multibillion dollar market." Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, Gambling and Organized Crime, S. Rep. No. 1310, 87th Cong., 1st Sess., 43 (1962). The President's Commission on Crime in the District of Columbia reported that "over 100 million dollars is bet annually on 'numbers' and sports events" in the Washington metropolitan area. The Commission, relied for its figures on information supplied by Sheldon S. Cohen, Commissioner of Internal Revenue. Report of the President's Commission on Crime in the District of Columbia 112 (1966).

[4] Investigations by congressional committees have established that gambling revenue provides a principal source of revenue for organized

repeatedly recognized that "a tax is not any the less a tax because it has a regulatory effect." *Sonzinsky* v. *United States*, 300 U. S. 506, 513 (1937). See also *License Tax Cases*, 5 Wall. 462 (1866).

In declaring the registration requirements of § 4412 invalid, the Court places principal reliance on *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965). But there is a critical distinction between that case and the cases decided today. In *Albertson*, the Court dealt with a registration requirement which clashed head-on with protected First Amendment rights and which could be viewed as serving no substantial governmental purpose in light of the curtailment of those rights.[5] These elements are notably lacking in the cases decided today. The occupation of gambling can in no sense be called a "protected" activity. The only claim that those engaged in gambling make is that they are somehow entitled to have their activities shrouded in secrecy and shielded from disclosure. Nothing in the Constitution compels such a result. And there is clearly a legitimate

---

crime in this country. See S. Rep. No. 1310, 87th Cong., 2d Sess., 43 (1962); S. Rep. No. 141, 82d Cong., 1st Sess., 11 (1951). Some congressmen may well have been motivated by a desire to control and curtail organized crime in enacting the tax laws challenged in these cases. However, it is not the task of this Court to examine such motives in ruling on the constitutionality of such laws, and the Court today has wisely declined to engage in any motive-searching inquiries.

[5] I recognize that *Albertson* was decided on Fifth Amendment grounds without reaching the petitioner's First Amendment claims. 382 U. S., at 73–74 and n. 6. However, in applying the *Albertson* holding to the facts of this case, it cannot be overlooked that the registration requirement in *Albertson* was directed at the petitioner's organizational affiliations which were arguably protected by the First Amendment. See *United States* v. *Robel*, — U. S. — (1967). There is no such First Amendment issue lurking in the cases decided today. The operative fact upon which the registration requirement of § 4412 depends is an individual's status as a gambler.

tax purpose in demanding that gamblers make the disclosures required by § 4412 and Form 11–C. Disclosure by means of registration is routinely required under the tax laws of those engaged in legitimate and lawful business enterprises. See, *e. g.*, 26 U. S. C. §§ 4101, 4222, 5502, 5802. Cf. *Shapiro* v. *United States*, 335 U. S. 1 (1948). To relieve gamblers of the registration requirement is to create for those engaged in that occupation a special constitutional privilege of nonregistration.

In view of these considerations, I cannot understand why the Court today finds it necessary to strike down the registration requirement of § 4412 directed at those who derive their income from gambling. What seems to trouble the Court is not that registration is required but that the information obtained through the registration requirement is turned over by federal officials, under the statutory compulsion of 26 U. S. C. § 6107,[6] to state prosecutors to aid them in the enforcement of state gambling laws. If that is the source of the Court's Fifth Amendment concern, then constitutional adjudication demands that the provisions of § 6107 be the focus of the Court's decision. It does not seem reasonable to me to rule that, because information derived from the registration provisions of § 4412 must be made available to state prosecutors under § 6107, the registration requirements suffer from a fatal constitutional infirmity, even though § 4412 is a necessary and proper means of assuring that the occupational tax on gamblers will be enforceable. Certainly no Fifth Amendment issue arises from the fact of registration until an effort is made to use the registration procedure in aid of criminal prosecution. To the

[6] The Court points out in *Grosso* v. *United States* that the disclosure requirements of § 6107 do not extend to the excise tax provisions of § 4401. But, by administrative practice, the identity of those who pay the excise tax on wagers is made known to state prosecuting officials. *Ante*, p. —.

extent that the disclosure requirements of § 6107 would raise a Fifth Amendment problem because some of the names on the public list have admitted unlawful activities, that statutory provision is severable for purposes of constitutional adjudication. In fact, in the Internal Revenue Code itself, Congress has specifically enacted a severability clause. Section 7852 (a) of Title 26 provides: "If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." That clause represents a clear statutory command to this Court to wield its constitutional knife surgically, concentrating on the suspect provisions of § 6107 rather than bludgeoning the entire taxing scheme. The Court cannot evade this constitutional and statutory duty, as it seems to do, by labeling every provision of the wagering tax statutes as "interrelated" or "integral."

There is no such narrow focus to the Court's approach to these two cases. In fact, the Court impliedly rejects such an approach in dealing with the Government's suggestion that the taxing scheme at issue be saved from constitutional interment by imposing a use restriction on the information derived from registration under § 4412. Cf. *Murphy* v. *Waterfront Commission,* 378 U. S. 52 (1964). The Court finds such a limitation unacceptable because the legislative history of the wagering tax system reveals a congressional purpose to make available to state and local law enforcement officials the disclosures made through registration. The Court reasons that to impose the use restriction would be to defeat the congressional purpose, and it finds the suggested saving device unacceptable. But realistically the Court's sweeping constitutional ruling has the effect of frustrating two congressional purposes—the disclosure purpose and the

revenue purpose. Such a result can hardly be justified on the ground of according a congressional purpose the deference due it by this Court. Conceding that the statutory scheme is intended to assist law enforcement, the fact that taxes in the sum of $115,000,000 have flowed from the wagering tax scheme to the Treasury in the past several years is convincing evidence of a legitimate tax purpose. The congressional intent to assist law enforcement should not be the excuse for frustrating the revenue purpose of the statutes before the Court. Regardless of legislative intent, this Court has in the past refused "to formulate a rule of constitutional law broader than is required." *Garner* v. *Louisiana*, 368 U. S. 157, 163 (1961); cf. *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 186, n. 43 (1963). This principle should prevail in this case where the Act has the wholesome objective of devising workable procedures to assure that gamblers will pay the same taxes on their profits as other citizens are compelled to pay.

I apprehend that the Court, by unnecessarily sweeping within its constitutional holding the registration requirements of § 4412, is opening the door to a new wave of attacks on a number of federal registration statutes whenever the registration requirement touches upon allegedly illegal activities. As I noted above, registration is a common feature attached to a number of special taxes imposed by Title 26. For example, the following provisions impose special registration requirements: § 4101 (those subject to the tax on petroleum products); § 4222 (registration regarding certain tax-free sales by manufacturers); § 4722 (those engaged in dealing in narcotic drugs); § 4753 (those who deal in marihuana); § 4804 (d) (manufacturers of white phosphorous matches); §§ 5171–5172 (registration of distilleries); § 5179 (registration of stills); § 5502 (manufacturers of vinegar); § 5802 (importers, manufacturers, and dealers in firearms). And

§ 7011 imposes a general registration requirement on all those liable for other special taxes.[7] Heretofore this Court has consistently upheld the validity of such registration requirements, without regard to the legality of the activity being taxed. *United States* v. *Sanchez*, 340 U. S. 42 (1951) (26 U. S. C. § 4753); *Sonzinsky* v. *United States*, 300 U. S. 506 (1937) (26 U. S. C. § 5841); *Nigro* v. *United States*, 276 U. S. 332 (1928) (26 U. S. C. § 4722). The implications of the Court's decisions today also extend beyond the tax statutes. For example, the statute requiring narcotics addicts and violators to register whenever they enter or leave the country, 18 U. S. C. § 1407, can now be expected to come under attack. My concern that such registration requirements will now come under attack is not imaginary. This very day the Court, adhering to its decisions in *Marchetti* and *Grosso*, declares unconstitutional in *Haynes* v. *United States*, *post*, p. —, 26 U. S. C. § 5851, which makes unlawful the possession of a firearm not registered under § 5841.[8]

---

[7] For example, the following sections impose occupational taxes and subject the taxpayer to the registration requirements of § 7011: § 4461 (those who maintain for use or permit use of coin-operated amusement or gaming devices); §§ 4721 and 4702 (a)(2)(C) (those who deal in narcotic drugs); § 4751 (dealers in marihuana); § 4821 (manufacturers or dealers in renovated or adulterated butter); § 4841 (manufacturers or dealers in filled cheese); § 5081 (those who rectify distilled spirits or wines); § 5091 (brewers of beer); § 5101 (manufacturers of stills); and 5111 (wholesale dealers in liquors, wines, and beer); § 5121 (retail dealers in liquors, wines, and beer); and § 5801 (dealers in certain firearms). The registration requirement applies uniformly to those engaged in such occupations lawfully and those whose activities would make them liable to criminal penalties.

[8] The petition for a writ of certiorari in *Haynes* was filed on March 11, 1967, almost a year after this Court granted a writ of certiorari in *Costello* v. *United States* (the companion case to *Marchetti*). In granting the writ, the Court stipulated as the sole question in *Costello* whether *Kahriger* and *Lewis* should be over-

The impact of that decision on the efforts of Congress to enact much-needed federal gun control laws is not consistent with national safety. In my view, the Court has failed to take account of these relevant implications in the very broad holdings of today's decisions.

---

ruled. 383 U. S. 942. There can be little doubt that the Court's specification of the question for argument in *Costello* prompted the Fifth Amendment challenge in *Haynes*.